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CURRENT TOPICS.

THE RIGHT of a finder of lost property to such property as against all the world, except the real owner, is illustrated by the recent case of Durfee v. Jones, 11 R. I. 54. In this case, A. bought an old safe, and afterwards offered it to B., who refused to purchase it. It was then left with B. for sale, B. having permission to use it. B. found between the outer casing and the lining a roll of bank bills belonging to some person unknown, whereupon A. first demanded the money and then demanded the safe and its contents as they were when B. received them. The safe was returned, but the money retained by B. In assumpsit brought by A. against B. for the money found, the court held that, as against A., B. was entitled to retain the money. This case, in its main features, resembles Bridges v. Hawkesworth, 15 Jur. 1079; 21 L. J. Q. B. 75; 7 Eng. L. & Eq. 424. There the plaintiff, while in the defendant's shop on business, picked up from the floor a parcel containing bank notes. He gave them to the defendant for the owner if he could be found. The owner could not be found, and it was held that the plaintiff as finder was entitled to them, as against the defendant as owner of the shop in which they were found. "The notes," said the court, "never were in the custody of the defendant nor within the protection of his house, before they were found, as they would have been if they had been intentionally deposited there." Also, Tatum v. Sharpless, 6 Phila. 18. There it was held that a conductor who had found money which had been lost in a railroad car was entitled to it as against the railroad company.

To what extent rules of equity promulgated by the court itself are binding upon it, is stated by the Supreme Court of Rhode Island in the recent case of Greene v. Harris, 11 R. I. The complainants claimed that the court below erred in allowing an amendment to the plea, such being contrary to one of its rules. Potter, ..., said: "While the rule does not provide for amending a plea as a matter of right, it would be contrary to all the principles of equity practice to consider it as preventing the court from allowing an amendment in cases where the justice of the case requires it, and it may be presumed the court would not allow it in any other case." Says Chief Justice Taney, in Rhode Island v. Massachusetts, 14 Pet 210, 257: 'The court of chancery has always exercised an equitable discretion as to its rules of pleading, whenever it has been necessary to do so for the purposes of justice.' The 49th New York chancery rule provided that if a plea be overruled, no other plea should be received. But it was laid down that this did not prevent the court from Vol. 5 .- No. 20.

allowing another plea on special grounds. 1 Hoffman Chancery Practice, 226. So, also, in the English Chancery. Rowley v. Eccles, 1 Sim. & Stu. 511. In in re Lyons, 1 Dr. & Wal. 327, 333, Lord Chanceller Plunkett said: "Rules ought to be enforced against a party who undertakes to act in opposition to them without an application to the court in the first instance. Yet there is no ground for saying, nor can it be pretended that these rules, the creatures of the court, are to become its masters, by assuming a nature so binding as to overrule and control the acts of that very court which gave them existence." And in Dicas v. Lord Brougham, 6 C. & P. 249, which was a suit against Lord Brougham in consequence of an order made by him in a case in chaneery, Lord Lyndhurst said that the Chancellor had the authority to make an order in a particular case altering the practice. So, also, in Burrell v. Nicholson, 6 Sim. 212, Shadwell, Vice Chancellor, said: "The orders of the court are to be considered as laying down general rules, but not as being so imperative that they can under no circumstances be departed from;" and also Lord Chancellor Cottenham, in Smith v. Webster, 3 Myl. & C. 244. And the ordinances of Lord Bacon, A. D. 1618, (No. 44), evidently contemplate the making of an order upon the special nature of the case against the general rules whenever necessary."

WHERE a sentence not authorized by law has been imposed upon a prisoner, an appellate court can only, under the rules of the common law, reverse the judgment; it has no power to impose the proper sentence, or to remand the case to the court of original jurisdiction for that purpose. This doctrine has been recently applied by the Court of Appeals of Maryland in the case of McDonald v. The State, 4 Am. L. T. Rep. 484, and though leading to the most absurd results, is in accordance with nearly all the authorities on the subject. See 1 Chitty Cr. Law, 755; 4 Blackstone, 393; Hawkin's Book, 2 ch. 50, sec. 19; Rex v. Ellis, 5 Barns. & Cress. 395; King v. Bourne, 7 Adol. & Ellis, 58; Silversides v. The Queen, 2 Gale & Davison, 617; Holland v. The Queen, 2 Jebb & Symes, 357; Christian v. Com., 5 Met. 530; Ratzky v. People, 29 N. Y. 124; Ex parte Lange, 18 Wall. 163. The result is that a prisoner whose guilt has been established by a regular verdict may escape punishment altogether, because the court commits an error in passing the sentence. In the Maryland case, the prisoner was found guilty of manslaughter, and sentenced by the criminal court of Baltimore to five years imprisonment in the city jail, while the punishment prescribed by the statute for such offenses was confinement in the state penitentiary for not more than ten years. The judgment being reversed, as has been said, by the Court of Appeals, the prisoner was again arrested, petitioned for a writ of habeas corpus, and upon the hearing before Bartal, C. J., it was held 1. that the petitioner having been arraigned and regularly tried upon a suffi-

cient indictment, and a legal verdict having been rendered, had been in jeopardy, and that he could not lawfully be placed in jeopardy a second time for the same offense; 2. that the former trial was, in no sense, a mistrial, for if it had been, the Court of Appeals would have remanded the case, so that the party might be tried again; 3. that the petitioner, by suing out his writ of error, and obtaining a reversal of the judgment, had not waived the protection which the law provides against a second jeopardy, and was not liable to be again indicted and tried for the same offense. In the opinion rendered by the chief justice, he remarked: "If the prisoner, after having been duly convicted of manslaughter, escapes punishment, by reason of an error in the sentence, this results from the want of legislative provision in such cases to enable the court of last resort to correct the sentence, or to remand the case to the criminal court for that purpose. Such legislation was had in England in 1848 (11th and 12th Victoria, ch. 78), and has been enacted in several of the states." Among these we may mention Massachusetts, Jacquin v. Com., 9 Cush. 279; New York, Ratzky v. People, supra; Mississippi, Kelly v. State, 3 Sm. & Mar. 518; Pennsylvania, Beale v. Com., 1 Carey, 11, and Missouri, Laws of 1877, p. 261.

In Coggins v. Helmsley, 34 Leg. Int. 394, it is held by the United States Circuit Court for the Eastern District of Pennsylvania, that the United States District Court has jurisdiction in admiralty of a libel for damages for the death of the husband of libellant, who was chief mate, and whose death was the direct result of the negligence of the steamer in causing the collision. The competency of the court to redress the injury complained of was denied upon the ground that the right to it had no existence at common law, but is purely statutory, and is not, therefore, a subject of admiralty cognizance. McKennan, J., said: "The jurisdiction of the Admiralty courts embraces all torts committed on the high seas, and, if the nature of the alleged wrong entitled the appellee to redress at all, the locality of its commission brought it within the rightful cognizance of the court. The denial of the right to compensation for personal injuries resulting in death seems to have its authoritative source in the declaration of Lord Ellenborough in Baker v. Bolton, 1 Camp. 493, that 'in a civil court, the death of a human being can not be complained of as an injury.' While the weight of authority in the common law courts is, perhaps, in favor of the principle thus stated, it has not been adopted with uniform sanction even by them. In Ford v. Monroe, 20 Wend. 210, damages were recovered by the father of a minor, who had been killed by the negligence of the defendants. But it does not appear that any question was made or adverted to that the action could not be maintained. In James v. Christy, 18 Mo. 162, where a minor was killed on board a steamboat by a defect in the machinery, a suit tor the loss of his services, by the administrator

of his father, was maintained against the owner of the boat. In Sullivan v. U. P. R. R. Co., 3 Dill. 334, 1 Cent. L. J. 595, Dillon, J. fully considers the cases on the subject, and concludes that an action for such an injury is maintainable. As was said by Sprague, J., in Cutting v. Seabury, 1 Sprague's Decisions, 525, 'the question is not one of local law, but of general jurisprudence, and I can not consider it as settled that no action can be maintained for the death of a human being,' * * 'but the natural equity and the general principles of law are in favor of it.' These declarations received the decided approval of Chief Justice Chase, in the Sea Gull, Chase, 148, in which he said: 'And certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules,' and declining to follow the common law cases on the subject, said; But these are all comman law cases, and the common law has its peculiar rules in relation to this subject, traceable to the feudal law and its forfeitures.' He therefore overruled a plea to the jurisdiction, and rendered a decree in favor of a husband, whose libel claimed damages against a vessel for injuries resulting in the death of his wife. So, also, in the Highland Light, Chase, 150, he held that the widow and son of a hand killed on a steam-vessel by the negligence of the engineer, had suffered an injury for which they might have redress in admiralty. Whatever, therefore, may be the course of the decisions of common law courts touching this question, the better opinion seems to be, that 'the human providence which watches over the rights and interests of those who go down to the sea in ships, and do their business on the great waters,' ought to afford redress for all the injuries to which they are unlawfully subjected. The exercise of such a jurisdiction by courts of admiralty is at least consonant with 'natural equity and the general principles of law,' and with the benign spirit of English aud American legislation on the subject."

PRELIMINARY INJUNCTIONS IN PATENT CASES.

A motion for a preliminary injunction (see the case of Bailey Wringing Machine Company v. Adams et al., published in the present number of this journal), is heard in a summary way, upon a necessity more or less urgent for the immediate interposition of the court, and it is presumed that there is not time for a full and thorough investigation which is to be made on a final hearing, where the witnesses can be subjected to cross-examination, and the process of the court may be used to compel the attendance of the witnesses and the production of evidence. In such a hearing, if the validity of the patent is denied, the court will not, in general, award an injunction upon the mere production of the patent.

The prima facie right under the patent must be strengthened, and that may be done in one of two ways; by a prior judgment or decree after a judicial investigation, or by exclusive possession for some time. Hovey v. Stevens, 1 Wood & M. 290; Orr & Littlefield, 1 W. & M. 13; Isaacs v. Cooper, 4 Wash. C. C. 259; Grover & Baker S. M. Co. v. Williams, 2 Fish 133. Proof of such prior recovery or continuous possession is necessary only when the validity of the patent is denied; (Sickles v. Mitchell, 3 Blatch. 548); but, if there is such a denial, and no evidence is produced of a prior recovery or of an acquiescence by the public, the injunction will not be issued unless the right of the complainant is clear and free from doubt, and the violations of that right equally clear. North v. Kershaw, 4 Blatch. 70; Earth Closet Co. v. Fenner, 5 Fish 15. If there is a prior judgment, then, as against those who were parties to that suit, (Poppenhusen v. N. G. Gutta Percha Comb. Co., 2 Fish 74, 4 Blatch. 184), or were interested in the defense, and had a full opportunity to contest the validity of the patent, (Robertson v. Hill, 6 Fish 465; Wells v. Gill, 6 Fish 89; U. S. & F. Felting Co. v. Sebestas Smelting Co., 10 O. G. 828; Birdsell v. Manufacturing Co., 6. O. G. 604), the granting of an injunction is almost a matter of course. Yet, even as against such parties, the verdict of a jury in a prior case will not be deemed conclusive on such a motion, for the application is addressed to the conscience of the judge, and his action is controlled by his own judgment, and not the judgment of a jury. Day v. Hartshorn, 3 Fish 32.

As against third parties, a prior recovery is ordinarily considered sufficient to justify the granting of an injunction. Sickles v. Pileston, 4 Blatch. 109; Parker v. Brant, 1 Fish 58; Orr v. Badger, 7 Leav. Rep. 465; Poppenhusen v. Gutta Percha Comb Co., 2 Fish 74; S. C. 4 Blatch. 184; Potter v. Muller, 2 Fish 465; Potter v. Stevens, 2 Fish 163; Potter v. Fuller, 2 Fish 251; Orr v. Littlefield, 1 W. & M. 13; Potter v. Whitney, 3 Fish 77; S. C. 1 Lowell 87; Putnam v. Weatherbee, 8 O. G. 320; Goodyear v. Hullihen, 3 Fish 25I; Jones v. Merrill, 8 O. G. 401; Thompson v. Mendelsohn, 5 Fish 187; S. C. 8, Phila. 166; Thayer v. Wales, 5 Fish 130; Tilghman v. Mitchell, 4 Fish 615; S. C. Blatch. 18; American Shoe Co. v. National Shoe Co., 11 O. G. 740; Goodyear v. Mullee, 3 Fish 420. however, never deemed to be conclusive. Thus it is said in Sargent v. Seagrave, 2 Curt. 553: "It was, and is open to the defendant to contest the validity of the complainant's title." In Potter v. Stevens, 2 Fish 163, it is said "that of itself affords sufficient, abundantly sufficient prima facie evidence for the court to grant the preliminary injunction asked for in this case, unless the evidence introduced upon the part of the respondents clearly overthrows these various adjudications in favor of the validity of these patents."

In Jones v. Merrill, 8 O. G. 401, it is said: "That adjudication must be held controlling upon an application for a preliminary injunction, unless cogent evidence is presented in addition to that which was found insufficient upon the final hearing." On the authorities it may be deemed to

be the law that the prior recovery merely makes a prima facie case for an injunction, and that the defendant may nevertheless contest the validity of the patent. Parker v. Brant, 1 Fish, 58; American Pavement Co. v. Elizabeth, 4 Fish, 189; Goodyear v. Hills, 3 Fish, 134; Potter v. Whitney, 3 Fish, 77; American M. P. Co. v. Atlantic M. Co., 5 Cent. L. J, 323. The weight which will be given to such recovery depends on the facts in each particular case. An injunction has been refused where the results of the previous trials have been conflicting; (Allen v. Sprague, 1 Blatch. 567; Batten v. Silliman, 3 Wall. Jr. 124; Parker v. Sears, 1 Fish, 93); or where the prior judgments were rendered on a different construction of the patent from that claimed in the pending action; (Mowry v. Railroad Co., 5 Fish, 587; s, c., 10 Blatch. 89); or where the verdicts have been obtained on inconsistent and contradictory claims. Parker v. Sears, 1 Fish, 93. If the judgment was entered under an arrangement between the parties, the question depends on whether there was a real contest before the entry of the judgment, for more weight is attached to a judicial investigation than to a mere default. Grover & Baker S. M. Co. v. Williams, 2 Fish, 133; Potter v. Fuller, 2 Fish, 251; Orr v. Littlefield, 1 W. & M. 13. If a motion for a new trial, or a bill of exceptions, or an appeal has been taken or made, this does not, on the one hand, present an insuperable objection to a temporary injunction; and, on the other hand, the judgment does not present as strong a case as if there were no such motion, exceptions or appeal. Furbush v. Branford, 1 Fish, 317; Wells v. Gill, 6 Fish, 89; Morris v. Lewell Manuf. Co., 3 Fish, 67; Hartshorn v. Day, 3 Fish, 32. In addition to the circumstances which tend to weaken the force of the prior recovery, the defendant, to defeat the application for an injunction, may show that the title was not fairly in controversy in the prior suit, or that some material fact was not then proven, or that some adverse argument was overlooked. Parker v. Brant, 1 Fish, 58; American Pavement Co. v. Elizabeth, 4 Fish, 189; Batten v. Silliman, 3 Wall, Jr. 124. As the granting or refusal of an injunction is a matter resting entirely in the discretion of the court, it may be refused if the defendant will give a bond conditioned to keep an account of his sales and pay the amount of any final decree that may be rendered against him. Furbush v. Bradford, 1 Fish, 317; Jones v. Merrill, 8 O. G. 401: Stainthorp v. Humiston, 2 Fish, 311; Goodyear v. Honsinger, 3 Fish, 147; American Pavement Co. v. Elizabeth, 4 Fish, 189.

HON. W. H. DRAPER, C. B., Chief Justice of the Court of Error and Appeal, of Ontario, Canada, died on the 2d inst., after a lingering illness, in the seventy seventh ye r of his age. He was called to the bar in 1828, elected to parliament in 1841, and elevated to the bench in 1847. The only judicial opinion of Lord Fortescue which ever

THE only judicial opinion of Lord Fortescue which ever made a deep impression on the American side of the Atlantic is one involving the difficult question of domicile, and is thus reported: "A man's bed stood so high that he lodged in two parishes at once. The question was where his settlement should be. Mr. Justice Fortescue said where his head lay; as being the more noble part."

EFFECT OF MARRIED WOMAN'S ACT UPON THE STATUTE OF LIMITATIONS.

CASTNER ET AL. v. WALROD.*

Supreme Court of Illinois, September Term, 1876.

HON. BENJAMIN R. SHELDON, Chief Justice.

"SIDNEY BREESE,
"T. LYLE DICKEY,

Associate Justices.

PINCKNEY H. WALKER, JOHN M. SCOTT, ALFRED M. CRAIG,

1. SINCE THE PASSAGE OF THE MARRIED WOMAN'S ACT of 1861, the statute of limitations runs against a married woman the same as against a feme sole. The expression in Morrison v. Norman, 47 Ill. 477, and Noble v. McFarland, 51 Ill. 226, to the effect that the Married Woman's Act of 1861 has no effect upon the saving clause in the limitation law,

2. STATUTE-CONSTRUCTION .- Courts are not confined to the literal meaning of words in a statute in its construc tion, but the intention may be collected from the necessity or cause of the act, and its words may be enlarged or restricted according to its true intent.

3. LACHES AS A DEFENSE IN EQUITY. - Where a party. with full knowledge of all the facts, sleeps upon his rights for nineteen years without asserting his equities, and no sufficient excuse is shown for the delay, his laches will be such as to present a bar to relief in a court of equity. A court of equity will not enforce a stale demand.

4. LIMITATION IN EQUITY .- In the absence of a statute of limitations, the time in which a party will be barred from relief in a court of equity depends, to a certain extent, up-on the facts of the particular case; but when the statute has fixed the period of limitation barring the claim at law, courts of equity, by analogy, will follow the limitation provided by law. A court of equity will often treat a less period of time as a presumptive bar to a recovery.

5. SAME.-Where a party procured a bond for a deed, and assigned the same through his son for money with which to make a payment, and died, and the assignee com-pleted the payments, taking a conveyance to himself, and went into possession of the land, and made valuable improvements thereon, and paid all taxes for a period of nineteen years, residing upon the premises, it was held, that the heirs of the original purchaser, having knowledge of the facts, were not entitled to relief in equity as against such grantee, on account of their long acquiescence and

Writ of error to the Circuit Court of Kane County; the Hon. Theodore D. Murphy, Judge, presiding. Wheaton, Smith & McDole, for the plaintiffs in error. J. H. Mayborne for defendant in error.

CRAIG, J., delivered the opinion of the court:

This was a bill in equity, brought by plaintiffs in error in the Circuit Court of Kane County, against James Walrod, to enforce the conveyance of a certain tract of land, the equitable title of which, it is claimed, belongs to them.

The defendant, James Walrod, put in an answer to the bill, and, replication having been filed, a hearing was had upon the pleadings and proofs, and the court entered a decree dismissing the bill. The complainants bring the record here, and urge as a ground of reversal that the court erred in dismissing the bill upon the evidence contained in the record.

It appears, from the evidence preserved in the record, that on the 27th day of October, 1849, Amos Haskins, the father of the complainants, purchased the land in controversy of one Owen Hall, for the sum of \$140, payable, \$50 on the 1st day of October, 1850, \$50 in two, and \$40 in three years from the day of purchase, with six per cent interest thereon. Haskins gave his promissory note for the purchase money, and received of

Hall a bond, providing for a conveyance of the land upon the payment of the notes. Haskins went into possession of the land under his purchase, and made slight improvements thereon. In the summer of 1850 he lost the bond for a deed, which was subsequently found by his son, Asa Haskins, who is one of the com-plainants in the bill. On the 16th day of October, 1850, Asa Haskins obtained of the defendant \$35 or \$40 for one month, and assigned the bond, in the name of his father, as security for the money. Asa Haskins testified that the money thus obtained of the defendant was used, in connection with other money which he had, to pay the first fifty dollar note, and the interest on the other notes given for the land.

On the 4th day of November, 1850, Amos Haskins died. The money which had been loaned by defend-ant not having been paid, on the 19th of November, 1850, the defendant presented the bond to Hall, and called for a deed as assignee of Amos Haskins, and upon the payment of the deferred payments, one of \$50 and the other of \$40, Hall, on that date, executed and delivered to the defendant a deed for the premises, which was, on the day it was executed, placed upon record. Immediately after receiving the deed, James Walrod took possession of the premises thereunder, and has remained in possession ever since, made valuable improvements, and paid all taxes assessed thereon. After Walrod had obtained the deed of Hall, he made an effort to settle with the widow and heirs, and obtain a conveyance from them. In this, however, he failed, except as to the widow and Asa, who, upon a certain consideration paid them, executed an instrument, in writing, on the 20th day of December, 1850, conveying their interest in the premises to him.

No legal proceedings of any character were instituted by the complainants to obtain their rights in the premises, although they were fully informed of the manner in which the defendant acquired the title, until the filing

of this bill, on the 20th day of January, 1869. While the facts disclosed by the record might have warranted a court of equity, had the complainants evoked the aid of the court in apt time, in decreeing the relief prayed for in the bill; yet where the complainants, with a full knowledge of all the facts in their possession, have slept upon their rights for a period of nineteen years, and have failed to give any satisfactory reason for the delay, and have permitted the defendant to improve and develop the property until it has become valuable, the case is presented in entirely a differ-

The principle that must control a case of this character has been clearly stated by Lord Camden, in Smith v. Clay, 3 Brown's Chancery Reports, in these words: "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slept upon its rights for a great length of time. Nothing can call this court into activity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction, there was always a limitation of suit in this court.

The principle announced in the case cited has been so long sanctioned and upheld, both in the courts of England and this country, and the doctrine that courts of equity will not lend their aid to enforce stale demands so well understood and so well established, that the citation of authorities to sustain the question would seem to be unnecessary. The question has, however, frequently arisen in this court, and the decisions are uniform. Beach v. Shaw. 57 Iil. 25; Rogers v. Simons, 55 Ill. 76; Winchell v. Edwards, 57 Ill. 45; Carpenter v. Carpenter, 70 Ill. 457.

^{*} From advance sheets of 33 Ill.

In the absence of the existence of a statute of limitations, the time in which a party will be barred from relief in a court of equity must necessarily depend, to a certain extent, upon the facts of each case, as it may arise; but when the statute has fixed the period of limitation under which the claim, if interposed in a court of law, would be barred, courts of equity, by analogy, follow the limitation provided by law. This is fully established in Kane County v. Herrington, 50 Ill. 239, where it is said: "Where the statute of limitation would bar an action at law, and the matter is litigated in chancery, the latter tribunal, following the analogies of the law in such cases, would hold the claim to be stale, and refuse the relief sought." To the same effect are Angell on Limitations, see. 467, and Chalmondeley v. Clinton, 2 Jac. & Wal. 141.

A court of equity will, however, often treat a lapse of a less period than that provided in actions at law as a presumptive bar, on the ground of discouraging stale claims, or gross laches or unexplained acquiescence in the assertion of an adverse right. 2 Story Eq. Jur.,

sec. 1520.

An application of these principles to the facts disclosed by the record, would seem to leave no room to doubt the correctness of the decree rendered by the circuit court.

The record discloses that the defendant, on the 19th day of November, 1850, obtained a deed of the land in controversy of Owen Hall, who, it is conceded, held the legal title, deducible of record from the state or the United States. The deed was placed upon record, the defendant moved upon the land, and from that time to the filing of the bill he resided upon and held the actual possession of the entire tract as a residence. Under the limitation laws of the state, known as the act of 1835, possession by actual residence under a connected title, in law or equity, deducible of record from this state or the United States, for a period of seven years, is a bar to a recovery. The bill was not filed until the 20th day of January, 1869. The bar to a recovery of the possession of the land in an action at law was complete twelve years before the filing of the bill.

But it is urged by complainants that they are not barred by the lapse of time, because the defendant acquired the title by fraud. If fraud had been established, that can not be held a sufficient excuse for the delay and laches of the complainants. As early as 1850 the complainants were fully cognizant of all the facts under which the defendant procured the title to the premises, and the delay of nineteen years before proceeding to assert their rights in a court of equity is ut-

terly unaccounted for.

The case of Cox v. Montgomery, 36 Ill. 396, was a bill in equity to avoid a contract for the exchange of land on the ground of fraud. The proof established the existence of fraud, but in deciding the question in regard to the time in which a bill should be filed, it was said: "This species of remedy must be invoked with reasonable diligence. In a country where the value of real estate changed as rapidly as in Illinois, it would be clearly unwise to permit a purchaser of land to retain it for nearly eighteen months after the discovery of the fraud, before filing his bill to rescind. This is an unreasonable delay, which a court of chancery can not tolerate."

The complainants have cited some decisions of other courts upon the question, but a reference to them is not deemed necessary, as the case cited is conclusive upon the point raised. It is, however, urged by the complainants, that, at the time the defendant acquired the title to the land, three of complainants then were and still are under the disability of coverture, and as to them the statute of limitations did not run, nor are they concluded by laches or acquiescence.

The position taken might be regarded more plausible were it not for an act of the legislature, adopted April 24, 1861, known as "An act to protect married women in their separate property." Prior to this act, the possession of lands by actual residence, under a connected title deducible of record, would not constitute a bar to a recovery as against a feme covert. The saving clause in the act provided, in all the foregoing cases in which the person or persons who shall have a right of entry, title or cause of action, is or shall be, at the time of such right of entry, title or cause of action, under the age of twenty-one years, insane or feme covert, such person or persons may make such entry or institute such action, so that the same may be done within such time as is within the different sections of this chapter limited, after his or her becoming of full age, sane or feme sole.

When this saving clause was enacted for the protection of married women, a feme covert could not own personal property. After marriage, the personal estate of the wife became that of the husband. If she possessed lands, the husband acquired an estate, during her life, therein. If a child of the marriage should be born alive, the husband would then take an estate for life as tenant by the curtesy. He had the sole right to the possession of the wife's lands, and the rents, issues and profits thereof. In addition to this, the wife had no power to contract in regard to her property. Under the rigor of the law, in effect, a feme covert was divested of her lands and all control over them, and her personal property was transferred to the husband. If her lands should become occupied adversely, she was powerless to prevent the running of the statute of limitations by the payment of taxes herself, for the reason the law had stripped her of personal property and money. She could not sue the occupant and recover possession, because the law had given the right of possession to the husband.

The powerless condition of a feme covert over her lands, no doubt, induced the enactment of the saving clause in favor of married women. The act of 1861, however, created a radical change of the common law in regard to the rights of married women over their own property. It provides "that all property, both real and personal, belonging to any married woman as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman, during coverture, acquires in good faith from any person other than her husband, by descent, devise or otherwise, together with all the rents, issues, increase and profits thereof, shall, notwithstanding her marriage, be and remain, during coverture, her sole and separate property, under her sole control, and be held and possessed and enjoyed by her the same as though she was sole and unmarried, and shall not be subject to the disposal, control, or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband."

Under this statute, the wife was given the entire and sole control of her personal and real property. Should her lands be occupied adversely, she could bring ejectment. She could use her own money to pay taxes, and thus prevent an occupant from holding possession and paying taxes until possession and payment would ripen into a bar to a recovery. The reason, therefore, for the enactment of the saving clause for the protection of a feme covert, would seem to have been entirely removed by the adoption of the act of 1861.

The scope of this act, and its effect, were fully comprehended by this court as early as 1863, when, for the first time, it came before the court for construction, in Emerson v. Clayton, 32 Ill. 493, where it was said: "By this statute, a married woman must, since its enact-

ment, be considered a feme sole in regard to her estate of every sort owned by her before marriage, or which she may acquire during coverture, in good faith, from any person not her husband, by descent, devise or otherwise, together with all the rents, issues, increases and profits thereof. • • • They designed to make, and did make, a radical and thorough change in the condition of a feme covert. She is unmarried, so far as her property is concerned, and can deal with it as she pleases."

If, then, under the act of 1861, a feme covert became unmarried, so far as her property was concerned, the conclusion is irresistible that the saving clause in favor of married women, in the limitation law, was abrogated, as the two acts are so utterly inconsistent that

they can not stand together.

It is true, the act of 1861 does not purport to repeal the saving clause in the limitation act, but it is manifest a reasonable construction of the language used, in connection with the scope, purpose and object of the

statute, produces that result.

Courts are not confined to the literal meaning of the words employed in the construction of statutes, but, as was said in Burgett v. Burgett, 1 Ohio Rep. 221, "The intention of the law-makers may be collected from the cause or necessity of the act; and statutes are sometimes construed contrary to the literal meaning of the words. It has been decided that athing within the letter was not within the statute, unless within its intention. The letter is sometimes restrained, sometimes enlarged, and sometimes the construction is contrary to the letter. 4 Bac. title Statute, 1, secs. 38, 45, 50. Every statute should be construed with reference to its object, and the will of the law-makers is best promoted by such a construction as secures that object, and excludes every other."

Slater v. Cove, 3 Ohio St. 80, may be regarded an authority in point upon the question. There, two acts passed by the legislature of Ohio were before the court for construction. One, a limitation act, was passed in 1831, the first section of which fixed the limitation upon actions of trespass upon real property, at four years. The second section contained the provision that, if any person entitled to any other action limited by this act shall, at the time such cause of action accrued, be within the age of twenty-one years, feme covert, insane or imprisoned, every such person shall be at liberty to bring such action within the respective times limited by this act, after such disability shall be

removed.

When this act was passed, the age of majority for females was twenty-one years. In February, 1834, a law passed providing that females were of age at the age of eighteen. The act of 1834 did not profess to amend or repeal the act of 1831, nor did its provisions in any manner allude to the act of 1831, and yet it was held that the disability of females was removed when they arrived at the age of eighteen years. In the dis-cussion of the question, the court said: "When the act of the 17th of February, 1834, was passed, fixing the age of eighteen years as the period for the removal of the disability of infancy as to females, although it in nowise repealed or amended the Statute of Limitations, yet, as to females, it produced a change in the circumstances and relations of the subject-matter of this particular provision of the law, which altered not the law, but its application. When the age of twenty-one years ceased to be the period for the removal of the disability as to females, a change was produced in the subject of this provision in the Statute of Limitations, so that the object of the law, its reason and intention being manifestly to provide for the commencement of the running of the Statute of Limitations at the time when the disablity of infancy ceased, it became applicable to females at the age of eighteen years instead of the age of twenty-one."

The same reasoning applies with peculiar force to the question under consideration. While the saving clause in the Statute of Limitations is not mentioned in the act of 1861, yet the power conferred by the act so completely annihilated the existence of every reason which led to the passage of the former act protecting married women from the running of the Statute of Limitations, that it would be absurd to hold that the two acts could stand together.

Again, if a feme covert is unmarried, so far as her property is concerned, and she can deal with it as she pleases, as was held in Emerson v. Clayton, supra, no reason is perceived why she should receive the protection of a saving provision of a statute of limitation. When she was given the management and sole control of her property, she ought at least to assume the responsibilities that are cast upon those of her sex who possess property, and are sole and unmarried.

It may, however, be said that the views here expressed are in conflict with what was said in Morrison v. Norman, 47 Ill. 477, and Noble v. McFarland, 51 Ill. 226. In so far as expressions may be found in these and other like cases to the effect that the saving clause in the Statute of Limitations in relations to femes covert was unaffected by the act of 1861, they are modified by the construction here given the statute.

If, then, the disability of coverture was removed by the act of 1861, it necessarily follows that the residence of the defendant upon the premises under title deducible of record, forms a complete bar to a recovery. The possession of the defendant commenced as early as a gainst the life estate in the husbands of the complainants. This life estate was, therefore, barred prior to the passage of the act of 1861, and when barred, it was, for all practical purposes, gone, and the husbands, in effect, no longer had any interest in the premises.

As was said in Hinchman v. Whetstone, 23 Ill. 185 when the right of entry and right of action are both lost, it is difficult to perceive what practically remains to the former owner. When, therefore, the life estate which the husbands had acquired by virtue of marriage, was terminated by operation of the Statute of Limitations, and the act of 1861 removed the disability of coverture of the complainants, they were then bound to bring their action within seven years, or their right or title would be barred. This complainants failed to do, but permitted defendant to remain upon the land undisturbed for more than seven years after the passage of the act of 1861. By non-action on their part, they have lost their rights; they are not protected by the saving clause of the statute. Their laches is inexcusable, and we perceive no ground upon which they can recover.

The decree of the circuit court will be affirmed.

DECREE AFFIRMED.

SHELDON, C. J., dissenting:

As respects the bearing of the act of 1861, known as the Married Woman's Act, upon the saving clause of the limitation laws, I am disposed to adhere to the former decision of this court, upon this very subject, in Morrison et al. v. Norman et al., 47 Ill. 477, where, upon due consideration, the following result was announced: "We must hold the saving clause of the limitation law to be unaffected by the act of 1861."

DICKEY, J.: I concur in the views of Mr. Justice Sheldon. It is not easy to perceive how the ruling of this court, that the act of 1861 did not dispense with the joining of the husband with the wife in the conveyance of her separate property, can be justified, if this act be held to have repealed the saving clause in the Statute of Limitations made in favor of a feme

BREESE, J.: I do not concur in this opinion. I think the law was correctly stated in Morrison v. Norman, 47 Ill. 437, and Noble v. McFarland, 51 Ill. 226. The construction thus placed on the statute in question has become a rule of property, and why that rule should be now discarded, I am at loss to perceive.

RIGHTS OF A CREDITOR SIGNING A COM-POSITION IN BANKRUPTCY AGAINST A SURETY.

GUILD v. BUTLER.

Supreme Judicial Court of Massachusetts, March Term, 1877.

HON. HORACE GRAY, Chief Justice.

"JAMES D. COLT,
"SETH AMES,
"MARCUS MORTON,
"WILLIAM C. ENDICOTT,
"CHARLES DEVENS, Jr.,
"OTE P. LOPP.

Associate Justices.

OTIS P. LORD,

THE ACT OF A CREDITOR of a bankrupt in consenting to a resolution for a composition under the United States Statute, 1874, ch. 390, § 17, does not discharge one who is liable as surety for the debt included in the resolution.

Action of contract upon a promissory note made by the defendants, and payable to the firm of Robert W. Dresser & Co., or order, by whom it was indorsed to the plaintiff. The evidence at the trial below showed that the note was made for the accommodation of the payees, who, at the time it was made, entered into a written agreement with defendant to pay it at maturity; that plaintiff was ignorant of this when he took the note, but upon learning it, and after this action was begun, he joined other creditors of the payees in a petition in bankruptcy against H. D. Brandt, the surviving partner of the payees' firm, and afterwards voted for and signed a resolution of composition under sec. 17, ch. 390, of the U. S. Stat. of 1874, by which the creditors agreed to take 20 per cent. in full settlement, payable in three equal instalments, in ten days, three months and six months from the acceptance of the resolution, which was approved by the bankruptcy court and recorded.

The jury were instructed that if the note in suit was an accommodation note, and defendant, as between him and the payees, was but a surety, and plaintiff knew it was an accommodation note when he entered into the resolution of composition, the fact of his entering into that resolution would constitute a defense to this action.

P. H. Hutchinson, for plaintiff; R. Stone, Jr., for defendant.

GRAY, C. J., delivered the opinion of the court:

By the existing acts of Congress upon the subject of bankruptcy, a bankrupt estate may be settled, and the bankrupt discharged in either of three ways.

First. The estate may be administered in the ordinary manner by assignees appointed for this purpose, and a certificate of discharge be granted by the court, with the assent in some cases of a certain proportion of the creditors who have proved their claims. Any person liable as surety for the bankrupt, may upon paying the debt, even after the commencement of proceedings in bankruptcy, prove the debt or stand in the place of the creditor if he has proved it; or the debt not having been paid by him nor proved by the creditor, may prove it in the name of the creditor or otherwise. U. S. Rev. Stats., § 5070; Mace v. Wells, 7 How.

272; Hunt v. Taylor, 108 Mass. 508. But the surety's liability to the creditor is not affected by any certificate of discharge granted to the principal. Stats., § 5118; Flagg v. Tyler, 6 Mass. 33.

Second. The estate may be wound up and settled by trustees nominated by the creditors upon a resolution passed at a meeting for the purpose by three-fourths in value of the creditors, whose claims have been proved and confirmed by the court, and upon the signing and filing by such proportion of the creditors of a consent that the estate shall be so settled, in which case such consent and the proceedings under it shall bind all creditors whose debts are provable, even if they have not signed the consent nor proved their debts. The trustees have the rights and powers of assignees; the winding up and settlement are deemed proceedings in bankruptcy; the court may summon and examine on oath the bankrupt and other persons, and compel the production of books and papers, and the bankrupt may obtain a certificate of discharge in the usual manner. U. S. Rev. Stats., § 5103.

Third. The creditors, at meeting ordered by the court, either before or after an adjudication in bankruptcy, may resolve that a composition proposed by the creditor shall be accepted in satisfaction of the debts due them from him. Such resolution, to be operative, must be passed by a majority in number of the creditors whose debts exceed fifty dollars in value, and by a majority in value of all the creditors, and must be confirmed by the signature of the debtor, and two-thirds in number and one-half in value of all his creditors. The debtor is required to attend at the meeting to answer enquires, and to produce a statement of his assets and debts, and of the names and ad-dresses of his creditors. The resolution, with the statement, is to be presented to the court; and if the court, after notice and hearing, is satisfied that the resolution has been duly passed and is for the best interest of all concerned, the resolution is to be recorded and the statement is to be filed, and the provisions of the composition shall be binding on all creditors whose debts, names and addresses are shown on the statement, and may be enforced by the court on motion and reasonable notice, and regulated by rules of the court, or may be set aside by the court for any sufficient cause, and proceedings in bankruptcy had according to U. S. Stats. 1874, ch, 390, § 17.

This section providing for a composition under the supervision of the court, is taken from and substantially follows § 126 of the English Bankruptey Act of 1869, Stat. 32 and 33 Vict., ch, 71. See Exparte Jewett, 2 Lowell, 393, and Re Whipple, Id. 404. It has been determined in England by decisions of high authority and upon most satisfactory reasons that a creditor by participating in either of these three forms of proceedings, whether by assenting to a certificate of discharge or by consenting to a resolution, either for a winding up through trustees, or for the acceptance of a composition proposed by the debtor, does not release or affect the liability of a surety. Brown v. Carr, 2 Russ. 600; 5 Moore & Payne, 497 and 7 Bing. 508; Megrath v. Gray, L. R. 9 C. P. 216; Ellis v. Wilmot, L. R. 10 Ex. 10; Ex parte Jacobs, L. R. 10 Ch. 211, overruling Wilson v. Lloyd, L. R. 16 Eq. 60, cited by the defendant's coun-

The proceedings for a composition under the statute depending for their validity and operation, not upon the act of the particular creditor, but upon the resolution passed by the requisite majority of all the creditors, binding alike on those who do and those who not concur therein (if the debts are included in the statement filed by the debtor), and finally confirmed and established by the court, upon a consideration of the general benefit of all concurring, differ wholly in nature and effect from a voluntary composition deed, which binds only those who execute it. Oakley v. Parker, 4 Cl. & Fin. 207; s. C., 10 Bligh. N. R. 548; Bailey v. Edwards, 4 B. & S. 761; Bateman v. Gosling, L. R. 7 C. P. 9; Oriental Financial Co. v. Gurney, L. R. 7 Ch. 142; Cragoe v. Jones, L. R. 8 Ex. 81; Gifford v. Allen, 3 Metc. 255; Phoenix Cotton Manfg. Co. v. Hazen, 3 Allen, 441.

Assuming, therefore, that the defendant, having signed the note for the accommodation of the indorsers, was to be considered as a surety for them, and that the plaintiff, after acquiring knowledge of that fact, stood as if he had known it when he took the note, yet no defense is shown to this action.

EXCEPTIONS SUSTAINED.

LIABILITY OF RAILROAD COMPANY TO ITS EMPLOYEES.

SMITH v. THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY CO.

Supreme Court of Wisconsin, August Term, 1877.

HON. E. G. RYAN, Chief Justice.

"ORSAMUS COLE, Associate Justices."

W M. P. LYON,

INJURY TO EMPLOYEES—LATENT DEFECTS IN MACHINERY—DOTY OF RAILROAD COMPANY.—It is the duty of a railroad company to use due care and skill in providing safe machinery for its employees to operate, and to adopt and apply all reasonable and usual tests to discover defects in its machinery, but it is not responsible for injuries received by its employees through latent defects of machinery, where due care has been taken to provide against such defects.

The plaintiff was a brakeman in the employ of the defendant company. While in the discharge of his duties on a moving train, the signal to put on brake was given. The plaintiff obeyed the signal, and, while engaged in setting a brake, the brake-rod broke just below the cog-wheel near the plaintorm, and he was thrown under the cars on to the track and sustained serious injuries. It appeared that the brake-rod was defective, and that the defect was unknown to the plaintiff. The remaining facts appear sufficiently from the onjuiou.

Bleekman & Spalding, for plaintiff and respondent; John W. & M. B. Cary, for defendant and appellant.

COLE, J., delivered the opinion of the court:

Passing by the other exceptions taken on the trial, we think the circuit court erred in denying the motion for a new trial, for the reason that there was no evidence which warranted the jury in finding that the defendant was guilty of negligence in not applying a proper and sufficient test to the brake-rod. As we understand the special verdict, the company was not found guilty of any other act of negligence or misconduct than in that particular; for, in answer to the third question submitted, whether the defendant was guilty of negligence in not knowing of the defect in the brake-staff, or in not providing a safe and sufficient one, and, if so, in what the negligence consisted, the jury answered that they found the defendant guilty in not applying a proper and sufficient test to the brake-rod. It is true, the jury further found that the defendant, by the exercise of ordinary care, skill and diligence, might have known of the defect in the brake-rod, though it did not know of such defect, but this evidently refers to the failure to apply the proper test to discover it. In that matter alone, then, the company failed to perform its duty, and on that ground the plaintiff's right to compensation for the injury received is made to rest. It is very obvious that the verdict must be founded upon evidence, and the jury could find no fact not established by, or fairly inferable from, the testimony given.

On the part of the plaintiff no evidence was offered which tended in any way to prove that the company failed to exercise due and proper care and diligence in inspecting all cars which it purchased of other parties, or in testing the iron and materials from which the cars manufactured by itself were made. It does not appear whether the car in question was one that had been purchased by the company, or manufactured in its shops. It was a new flat car, which had been taken into the train but two or three days prior to the accident, and appeared to be a good car. When near Sparta, on returning from La Crosse, where the train had been, on the morning of the 5th of May, 1873, to deliver a load of wood, the usual signal to put on brakes was given by the proper officer of the train, and the plaintiff, in the discharge of his duty as brakeman, set a brake on the car ahead and then went to this car, which was the fourteenth from the engine, and, while engaged in setting the brake, the brake-shaft or rod broke just below the cog-wheel, near the platform, and he was thrown under the cars on to the track, and sustained the serious injuries of which he complains. It appeared that there was an old crack or flaw in the brake-rod which was unknown to the plaintiff and the other employees of the company, and which doubtless rendered the rod defective and unsafe. The plaintiff testified, in substance, that he had been in the employ of the company about four years; that he was a regular brakeman, but that it was also his business to look over and inspect the cars of his train every day and see if everything was in order, and to report and repair defects if he found any. He had not been working for a week before the 5th, but on that morning returned to his work and looked over the first eight cars from the engine, when the train started from Yomah for La Crosse. The train started immediately back from La Crosse after it was unloaded, but whether the plaintiff had time and opportunity to continue the inspection of the cars while at La Crosse is a point left in doubt upon the evidence. But in regard to the test applied to the brake-rods, the defendant proved by John Baillie, its master car-builder, that the iron was purchased of the best makers, and was of the best quality; that samples of each lot were tested in the defendant's shops in the usual and most approved manner; that all materials were inspected, as well as the work done, by first-class inspectors; that he him-self examined all cars purchased by the company thoroughly as to the character of the cars, the materials used, and their manufacture; that no car was allowed to go on the road in which he could discern any defect which would make it unsafe. It appeared that the system of inspection of cars which were purchased, and the tests applied to the materials of which its cars were manufactured, were the same as those adopted or applied by railroad corporations generally. Certainly there is not a particle of testimony which tends to show that the employees of the company, whose duty it was to make tests as to the sufficiency of the materials used for cars, or of inspecting and examining those purchased, were not skillful and competent to properly perform their duty; or that they had failed to perform it in respect to the cars in question; or that they had neglected to apply the usual well-known and approved tests to the iron; or had inspected the car in a careless manner. So far as we are able to judge from the testimony, the defect in the brake-rod was a latent one, which would not likely be detected or discovered by the usual examination or inspection of the car. And, as it was urged by the counsel for the company, it would undoubtedly be impracticable to apply tests to every brake-rod which is used upon defendant's cars, and, if compatible with the nature of the business, would be of doubtful utility. There should be at least some testimony tending to show that the tests applied to determine the sufficiency of the brake-rod were inadequate, and not in accordance with the most approved methods, to justify the finding of the jury.

In order to prevent all misapprehension on this point, we add that it was the plain duty of the company to use due care and skill in providing suitable and safe machinery for the plaintiff to operate, and to adopt or apply all reasonable and usual tests to discover any defect in the brake-rod. This is the degree of diligence which this court has decided the law imposes on such corporations. Brabbits v. The C. & N. W. Ry. Co., 38 Wis. 289; Wedgwood v. The C. & N. W. Ry. Co., 41 ib. 478, and we have no intention of relaxing that rule. We adopt as substantially correct the language of the court of appeals in Laning v. N. Y. C. R. R. Co., 49 N. Y. 521, that the duty of the master to his servant, or his implied contract with the servant, requires "that the servant shall be under no risks from imperfect or inadequate machinery, or other material means and appliances, or from unskillful or incompetent fellow-servants of any grade. It is a duty of contract to be affirmatively and positively fulfilled and performed. And there is not a performance of it until there has been placed for the servant's use perfect and adequate physical means, and for his help-meets fit and competent fellow-servants, or due care used to that end. some general agent, clothed with the power and charged with the duty to make performance for the master, has not done his duty at all, or has not done it well, neither shows a performance by the master, nor excuses the master's non-performance. It is for the master to do, by himself or by some other. When it is done, then, and not until then, his duty is met or his contract kept." Pp. 532-533.

The servant then takes the risk of the employment, and of a failure of the machinery from any latent object not discovered by practical tests. And this court, moreover, has held expressly that the negligence or misconduct of the officer or employee whose duty it is to attend to these things, and who, pro hoc vice, represents the company in the matter, is the negligence or misconduct of the company itself. Croker v. The C. & N. W. Ry. Co., 36 Wis. 637. See also Filke v. Boston and Albany R. R. Co., 53 N. Y. 549; Corcoran v. Holbank et al., 59 id. 517; Ford v. Fitchburg R. R. Co., 110 Mass. 210.

The question before us is not one relating to the weight of evidence or degree of proof, but it is where there is an entire absence of testimony to sustain the verdict. For there is absolutely no evidence which tends to show that the company was guilty of negligence in not apylying a proper and sufficient test to the brake-rod. For this reason we think the motion for a new trial should have been granted.

Judgment of the circuit court is reversed, and a new trial ordered.

PATENT LAW — PRELIMINARY IN-JUNCTION.

BAILEY WRINGING MACHINE CO. v. ADAMS ET. AL.

United States Circuit Court, Western District of Pennsylvania, September 22, 1877.

Before HON. WILLIAM MCKENNAN, Circuit Judge.

1. PRELIMINARY INJUNCTION—WHEN GRANTED.—A motion for a preliminary injunction is alw ys addressed to the discretion of the court. A preliminary injunction ought not to be granted in a patent case unless the complainant's title and the defendant's infringement are admitted, or are so clear and palpable that the court can entertain no doubt on the subject.

 ON MOTION FOR A preliminary injunction the court ought not to undertake the decision of fairly disputable questions of law and fact.

3. PRIOR RECOVERY.—A prior recovery does not entitle the complainant to a preliminary injunction, if new evidence is exhibited of such significance as would probably, if it had been presented, have changed the former decision.

MOTION for preliminary injunction.

Hon. Levi Woodbury, of Boston, and M. A. Woodward and F. Gillson, for plaintiff; Hon. Lysander Hill, Bakewell and Kerr, for defendants.

MCKENNAN, Circuit Judge.

A motion for a provisional injunction is always an appeal to the discretion of the court, but, in the class of cases to which the present one belongs, such discretion ought to be exercised only where "the complainant's title and the defendant's infringement are admitted, or are so clear and palpable that the court can entertain no doubt on the subject." "The court is not bound, in this stage of the case, to decide doubtful and difficult questions of law, or difficult questions of fact, nor exercise this high and dangerous power (if exercised rashly) in doubtful cases, before the alleged offenders shall have an opportunity of a full and fair hearing." Grier, J., in Farker v. Sears, 1 Fish, 96. This has long been the rule in this circuit at least.

The bill in this case is founded on a patent issued to the complainant as assignee, for an improvement in wringing machines. It is one division of the fourth reissue of letters patent originally issued to John Allender on the 11th of January, 1859, and extended for seven years. The original patent contained but two claims, the gravamen of which was a wringing roller of peculiar mechanical construction, with a covering of vulcanized india rubber, or any other elastic compound impervious to water. To each reissue new claims have been added until at last (in the reissue of February 9, 1875) they are eight in number, all of which, except the two original claims, are for subdivided combinations of devices, which, in the aggregate, constitute a complete wringing machine. That these several reissues and the expansion of the claims of the patent were induced by the progress of the art to which they appertain, seems to me to be evident, still they may be all valid, if the combinations claimed were embodied in the original machine and were the product of the patentee's genius. But to determine this they must be carefully scrutinized in connection with the state of the art at the date of the patent, and to this end the fullest opportunity for enquiry and examination is essential. In this stage of the case, and without an opportunity for full hearing, the court ought not to undertake the decision of fairly disputable questions of law and fact, if there be any such, by an exercise of power which this motion invokes.

Undeniably the defendants do not infringe the first two and the fourth claims of the patent. The third, fifth, sixth, seventh and eighth claims they are alleged to have infringed.

The last two of these claims are new and appear for the first time in the present reissue. They are for combinations in which the guide orguides described in the specification and shown in the drawings and model are a component element. Now, it is not so clear as to be free from doubt that the flanges extending over the ends of the rollers in the defendants' machines, which form part of the standards in which the journals of the rollers are supported, are the equivalents of the guide in the complainant's machine. They are formally dif-

ferent devices, and do not seem to have been expressly intended to perform the same functions. The only office of the flanges is to prevent the clothes, passing through the rollers, from running off the end and becoming entangled around the iron shafts. Rut although this effect might incidentally result from the use of the guide, such an adaptation of it does not seem to have been contemplated by the patentee. The specification requires—and this is clearly illustrated by the drawings—both faces of the machine between the the drawingsstandards to be covered with boards which extend over the ends of the rollers, and to which are to be fastened a semi-circular spout, simply "to guide the cloth or clothes between the rollers," so as to secure the application of their pressure at a point upon them at which, by reason of their peculiar construction, they have the greatest degree of elasticity. Not only is the exclusive functions of the flanges not claimed for or attributed to any of the devices described in the specification, but, in view of the prescribed structure of the machines, the independent performance of it by the guide is obviously impracticable. Under these circumstances, the applicability of the doctrine of mechanical equivalents, as it is defined in recent cases, may well be questioned; and the infringement of these claims is, therefore, a fair subject of contestation.

But these claims, as well as the others referred to, are contested for the want of novelty. Upon this point several affidavits of experienced and intelligent experts have been produced on each side, in which the opinions indicated are as positively expressed, as they are irreconcilably diverse. The weight of such evidence can only be properly estimated after the witnesses have been subjected to the ordeal of a cross-examination. Beside these a large number of prior patents have been exhibited, which, in the examination which I have been able to give them, raise doubts of the validity of some of the contested claims. These doubts may be removed, but the partial proofs which suggest them ought to be remitted to an exhaustive discussion, and more careful scrutinty at a final hearing.

In reaching this conclusion, I am not unmindful of the weight properly due to a judicial decision in favor of the patent. When made upon final hearing, and upon evidence which is only reproduced at a subsequent interlocutory hearing, it is right to be taken as conclusively establishing the complainant's title. Not so, however, if new evidence is exhibited of such significance, as would probably, if it had been presented, have changed the former decision. This patent has been repeatedly in litigation, but in one case only (Bailey Washing and Wringing Machine Co. v. Lincoln, 4 Fish. 379), was it subjected to a careful judicial examination at final hearing. If the able judge who decided that case had had before him the new evidence introduced at the hearing, I am not prepared to say that his conclusions might not have been materially modified, if not entirely changed by it. While, therefore, I would without question interlocutarily adopt his judgment of the affect of the proofs before him, I can not discard the influence of doubts caused by new evidence of material pertinency, and now decide "that the complainant's title and the defendant's infringement are so clear and palpable that the court can entertain no doubt on the subject.

The motion for a preliminary injunction is, therefore,

Lond Justice Amphlett has resigned his position as a Justice of the English Court of Exchequer on account of ill health. He was appointed a Baron of the Court of Exchequer in January, 1875. It is thought that Mr. Justice Lush will be selected to fill the vacant seat, in which case the latter's position will be tendered to Sir James Stephen.

NEGLIGENCE-COMMON EMPLOYMENT.

VALTEZ v. OHIO & MISSISSIPPI RAILWAY CO.

Supreme Court of Illinois, June Term, 1877. [Filed October 9, 1877.]

HON. JOHN SCHOLFIELD, Chief Justice.

SIDNEY BREESE, T. LYLE DICKEY.

BENJAMIN R. SHELDON, PINCKNEY H. WALKER, Associate Justices.

JOHN M. SCOTT, ALFRED M. CRAIG,

A CAR REPAIRER whose usual duties were in the shop of the company, into which ran one or more tracks and upon which cars were run in when needing repairs, was at work upon a car which, by the orders of the person in ch rge of the shop, had not been run into the shop, but upon the "dead track" outside of the shop (but in the yard) where cars not in use were frequently left standing. While thus engaged he was injured by the negligence of the engineer in charge of the switch engine of the yard. Held, that there could be no recovery against the company.

BREESE, J., delivered the opinion of the court:

This was an action in the St. Clair Circuit Court by Joseph Valtez, plaintiff, against the Ohio & Mississippi Railway Company, defendants, to recover damages for a personal injury caused by the negligence of defendants' servant.

The questions come before us on a demurrer to the evidence which had been adjudged in favor of the defendants, and a judgment rendered against plaintiff for the costs, to reverse which he appeals, and makes the point that the demurrer was not properly framed and should have been overruled on the ground and for the reason that it admitted the evidence instead of the facts which the evidence established.

We do not appreciate the force of this objection as now made, as the record shows the plaintff voluntarily without any order of the court, joined in the demurrer, thus distinguishing the case from that of Dormady v. The States Bank, 2 Scam. 236. It is the office of a demurrer to the evidence to withdraw the issues from the jury in order that the court may pronounce the law upon the facts admitted by the demurrer. The defendant, in effect, says to the plaintiff, by demurring to the evidence, that all the facts such evidence tends to prove are admitted to exist, but upon those facts you are not entitle to recover, and that we demand the judgment of the court.

What are the material facts admitted by the demurrer? The plaintiff was in the employment and service of the defendants, together with other servants and employees, in repairing cars at East St. Louis. The usual place of making such repairs was in a shed into which one or more tracks of the company entered. The person in charge of the repair gang, one Rein, directed that this car, which required new springs to be attached, should be placed on the "dead track," socalled for the reason that cars not in use were placed there, and where there would be less switching and less danger than in the shed. While he was so employed, he, by the negligence and carelessness of another servant of the company, employed on the same track at this depot, was badly injured.

This is the substance of the proof, and the question, so often decided by this court, of respondent superior arises. It is unnecessary to cite the numerous cases wherein this court has held that one servant can not recover from the common master for injuries done by a fellow-servant in the same line of employment, if the master had selected trusty and competent servants, and of this there is no dispute. The accident was caused by the driver of a switch engine there employed, mistaking the signal of the yardmaster. Plaintiff knew when he entered the employment of the company the hazard attending his vocation, and for the emoluments of his position assumed the usual and ordinary hazards of the service into which he entered; he knew the company employed many men, and had a right to believe some of them might be careless and negligent in the performance of a duty, and this hazard he voluntarily accepted. Those who are engaged in the service of the same master in carrying on and conducting the same general business in which the usual instrumentalities are used, may justly be considered fellowservants. A proper test of the existence of this relation may be to enquire whether the negligence of the one is likely to inflict injury on the other, as claimed by appellees in their argument. This is not the case of the Chicago and Alton R. R. Co. v. Murphy, admx, 53 Ill. 336. It was there said where the ordinary duties and occupations of the servants of a common master are such that one is necessarily exposed to hazard by the careless of another, they must be supposed to have voluntarily taken the risks of such possible carelessness when they entered the service and must be regarded as fellow-servants within the rule.

It is very plain that appellant knew when he entered the service of the company he would be exposed to the action of other servants of the company. That on an emergency he might be called upon to make repairs, as in this case, not in the shed but on the track, and be exposed to acts of engine drivers and others, when business called them on the same track. Admitting, as the demurrer does, all the facts and the inferences to be drawn from them, there is no cause of action made out, and the circuit court did right in sustaining the demurrer, and its judgment must be affirmed. See case of Ill. Cent. R. R. Co. v. Modglin, decided at this

term on same points.

DICKEY, J.: It was not the province of the court on demurrer to evidence to determine from the evidence that plaintiff's injury came from an act of a fellow-servant. That if true, is affirmative matter of defense, and on demurrer could not properly be considered. Nor do I think that the car repairer is in a common employment with the engineer managing the switch engine in the yard.

ABSTRACT OF DECISIONS OF SUPREME COURT COMMISSION OF OHIO.

Supreme Court Commission of Ohio, December Term, 1876.—Filed October, 1877.

HON. LUTHER DAY, Chief Justice.

" JOSIAH SCOTT,
" D. T. WRIGHT,
" W. W. JOHNSON,
" T. Q. ASHBURN,

Justices.

IT IS NOT A GOOD PLEA TO AN INDICTMENT FOR MURDER that a member of the grand jury which found such indictment, was a nephew of the person who was murdered. Opinion by WRIGHT, J.-State v. Easter.

STATUTE OF LIMITATIONS-DISABILITY .- 1. The privilege given by the second section of the statute of limitations of 1831 (Chase's Statute, 1786) to a person under disability, extends only to disabilities existing at the time when the right or cause of action first accrues. 2. Therefore, where a plaintiff is under the disability of infancy only, when her right of action first accrues. and afterwards marries before she becomes of full age, her coverture is not available as a disability within the statute. Her action can be commenced only within ten years after she becomes of full age. Opinion by Scott, J .- Cozzens v. Farran, Ex'r.

CRIMINAL LAW—CONCEALING STOLEN GOODS.—On an indictment under the 26th section of the crimes act,

1 S. & C., 412, which charged that the prisoner did knowingly buy and conceal stolen goods and chattels valued at upwards of thirty-five dollars, the jury rendered a verdict of guilty as charged, and found the value of the goods stolen and received at \$3 20. Held: 1. That concealment is not a necessary or essential element of the crime defined by said section, for which the prisoner was indicted; and if alleged in the indictment, it is surplusage and need not be proved. 2. That upon the verdict rendered, the defendant could not be sentenced under the act of 1836, 18. & C., 439, for concealing stolen goods; the misdemeanor as defined by that statute, that is, knowingly concealing stolen goods, not being a necessary or essential element in the crime as defined by the 26th section, of knowingly receiving or buying stolen goods. Judgment reversed. Opinion by Johnson, J .- Holtz v. The State.

STAMPED INSTRUMENTS-REVENUE ACT .- 1. The internal revenue act in force in June, 1866, invalidated such instruments as were required to be stamped only when the stamp was omitted with intent to evade the provisions of the act. 2. Where a note was secured by mortgage, the requirements of the revenue act were complied with, if either one was stamped in the highest amount required for either instrument. 3. Where an unstamped instrument, required by law to be stamped, was stamped subsequent to its execution, in accordance with the remedial section of the act of July 13, 1866, it was as valid as if stamped when it was made or issued. 4. Where an unstamped mortgage had been recorded, and the note which it was given to secure was subsequently stamped in an amount sufficient to validate both the note and mortgage, upon having such fact noted on the margin of the record, under the provisions of said remedial section, the record became as valid as if the note and mortgage had been sufficiently stamped. 5. But the provisions of the United States revenue act, which prohibit the recording of unstamped instruments, and declares their record to be void, applies only to such instruments as are required to be recorded by federal legislation, and to officers under federal control. Opinion by DAY, C. J .- Stewart v.

Hopkins. UNRECORDED MORTGAGES-BANKRUPTCY-PAY-MENT BY INSOLVENT DEBTOR .- 1. Under the law of this state, an unrecorded mortgage, as between the parties thereto, is valid; and, as to all others, takes effect from the time it is recorded. 2. A mortgage given in good faith to secure a loan of money more than six months before the fliing of a petition, upon which the mortgagor is declared a bankrupt, is valid as against his assignees in bankruptcy, if it be left for record by the mortgagee, in good faith, at any time before the petition is filed. 3. The mere fact that a mortgagee withholds a mortgage from record does not necessarily invalidate the mortgage as against creditors; it may have effect against them after it is recorded, unless it be impeached for fraud, and in determining that question such withholding from record must be considered. 4. A payment of a debt by an insolvent deutor can not be regarded as a forbidden preference under the 35th se tion of the bankrupt act, unless the debtor intended thereby to give a preference, and the creditor had reasonable cause to believe him to be insolvent. 5. The payment of a mortgage debt by an insolvent debtor, though within four months of the filing of his petition in bankruptcy, where the mortgage is full security for the debt, is not a preference within the meaning of the bankrupt act, for the estate of the bankrupt is not thereby diminished. 6. Nor does it make any difference whether the mortgage be recorded or not at the time of the payment, for the mortgage is valid between the parties, and might be recorded at any time. Opinion by DAY, C. J .- Stewart v. Hopkins.

JUSTICE COURT-JURISDICTION-NEGLIGENCE-IN-STRUCTIONS.—1. Where, after a civil action has been brought and continued before a justice of the peace, he resigns during the pendency of the action, and official papers and docket pass into the possession of the nearest justice in the township, such nearest justice of the peace has authority under sec. 208, S. & C., 806, to try and render a judgment in the action. 2. Where the subject of the action is within the jurisdiction of a justice of the peace, and the parties appear before such nearest justice, agree upon a day of trial, which is assented to by the justice, and thereupon the defendant demands a jury, which is awarded him, he thereby waives all objection to the jurisdiction of such justice to try the case. 3. The charge of a court to a jury should be confined to the case as made on trial; and a refusal to give a request, embracing a mere abstract question of law, having no practical application to the issue and facts of the case on trial, is no ground for reversing a judgment. 4. In an action for damages, alleged negligence on the part of the defendant, or contributory negligence on the part of the plaintiff, is a question of mixed law and fact to be decided by the jury, under proper instructions from the court; but in a case where there is no testimony tending to show the plaintiff to be guilty of contributory negligence, it is no ground for the reversal of a judgment that the court refused to charge the jury on the subject of contributory negligence. 5. Where the complaint, asking damages against a railway company for injury to stock, charges negligence and carelessness generally, it is not error to refuse to give to the jury a request limiting the cause of injury to the negligence of a single one of defendant's servants. Judgment affirmed. Opinion by ASHBURN, J .- Pitts., Cin. & St. L. R. R. v. Flem-

SALE OF GOODS-DEBTOR AND CREDITOR-MORT-GAGE.-1. A sale of goods upon a mere promise by the purchaser to pay for them out of the avails of their sales and of a stock of other goods owned by the purchaser, and the transaction is understood by them to create no relation between them but that of debtor and creditor merely, does not give the seller a lien on the goods, after their delivery, or on the avails of their sales, that can be specifically enforced; nor does it deprive the purchaser, where he owes the seller several debts, of the right to direct, when he makes a payment to such creditor, which debt shall be paid thereby. 2. Where a person owes another several distinct debts, he has the right to choose which debts he will pay first; and where, at the time of payment, he expressly directs what application is to be made of the payment, the creditor, if he retains the money, is bound to appropriate it as directed by the debtor. 3. The creditor can not divert a payment so made by his debtor, from the appropriation made by him, upon mere equitable considerations, that do not amount to an agreement between the parties giving the creditor a right to appropriate the payment otherwise than directed by the debtor; though more equitable considerations may control, where payment is made without designating its application. 4. Where a debtor owed the same creditor a debt secured by mortgages, and another on account, and paid to the creditor the amount of the mortgage debt with direction that it be applied in sat-· isfaction of the mortgage debt, and the creditor, without the right so to do, refused to apply the payment as directed by the debtor, but retained the money, and the debtor within four months thereafter was declared a bankrupt. Held, that, against the assignees in bankruptcy, the creditor can not apply the money on ac-count, nor can it be regarded as a debt or credit that may be set off against the account, under the provision of the twentieth section of the bankrupt law, and that it should be applied in satisfaction of the mortgage debt. 5. But a judgment, in such case, giving the money to the assignees, and the creditor the right to collect the amount out of the mortgage premises, in satisfaction of the mortgage debt, as a lien prior to that of the assignees, having the same practical effect that an application of the money on the mortgage would have, is not substantially prejudicial to either party, and for that reason will not be reversed. Judgment affirmed. Opinion by DAY, C. J. - Stewart v. Hopkins.

ABSTRACT OF DECISIONS OF SUPREME COURT OF OHIO.

Supreme Court of Ohio, December Term, 1876.

HON. JOHN WELCH, Chief Justice.

WM. WHITE, WM. J. GILMORE, GEO. W. MCILVAINE, W. W. BOYNTON, Associate Justices.

ASSAULT WITH INTENT TO ROB-WITNESS-FORM-ER CONVICTION.—1. On the trial of a person charged with an assault with intent to rob, it is error to admit testimony on behalf of the State tending to prove the defendant guilty of other assaults committed by him about the same time. 2. The credibility of a witness can not be affected by showing his former conviction of an offense under a city ordinance against disorderly conduct. A conviction, which may be shown to affect the credibility of a witness, under section 139 of the Criminal Code (66 Ohio Laws, 308) is such only as, independent of the section, would have rendered the convict incompetent to testify. Judgment reversed and cause remanded for new trial. Opinion by Mc-ILVAINE, J .- Coble v. The State.

ASSIGNMENT FOR BENEFIT OF CREDITORS. - A debtor assigned all his personal property for the benefit of creditors, and also executed to the assignee a mortgage upon real estate for their benefit; the debtor subsequently sold part of the mortgaged property to a third person, who agreed to pay a part of the purchase money by assuming and paying to the assignee a specific sum, which the assignee had agreed to take for a release of the mortgage lien upon the part sold; the assignee accordingly released the mortgage lien upon the record, and took the purchaser's note for the specified amount. Held, that the real consideration of the note was the release of the mortgage lien, and the fact that the debtor had failed and refused to execute his contract of sale was no good defense to an action upon the note by the assignee against the purchaser. Opinion by WELCH, C. J.-Keen v. Hall.

REPEAL OF STATUTE UNDER WHICH A DEFEND-NT IS INDICTED BEFORE TRIAL-TRIAL-JURY .- 1. When a statute under which a party stands indicted, is subsequently and before trial, repealed, without a saving clause, or other express provision in the repealing act as to offenses or pending prosecutions, the act of February 19, 1866 (S. & S. 1), saves, unaffected by such repeal, the pending prosecution. 2. Under the first section of chapter seven of the Criminal Code (74 O. L. 352), the court, in its discretion, may permit the jury in a capital case to separate during the progress of the trial and before the case is finally submitted to them. 3. In the trial of a capital case, where the homicide is admitted, and the defense of insanity is set up, the burden of establishing the defense by a preponderance of testimony rests upon the defendant. Opinion by GILMORE, J .- Bergin v. The State.

PETITION IN ERROR - JOURNAL ENTRY - BILL OF EXCEPTIONS .- 1. A petition in error to reverse the fi-

nal judgment in an action, brings before the reviewing court the whole record in the cause; and where, pending the proceeding in error, the court whose judgment is under review, makes an erroneous order striking the bill of exceptions on which the proceeding in error is founded from the record, such order may be reviewed in the pending proceeding; and the filing of an independent petition in error to reverse such order, ought not to be allowed. 2. Where the parties have consented to an entry on the journal of the court, duriug the term, showing that a bill of exceptions was duly perfected, they will be estopped from afterwards showing that the journal entry is untrue. 3. If the bill of exceptions is perfected in all other respects, the mere omission to file it with the clerk during the term will not invalidate it. When duly perfected and ordered to be made part of the record, the bill of exceptions is, in law, to be regarded as part of the record, whether it comes into the actual possession of the clerk during the term or not. Opinion by WHITE, J .- Potter v. Myers.

CONTRACT BETWEEN OWNERS IN COMMON OF LAND —PAROL EVIDENCE.—W. & W. and D. & C., owners in common of certain lands upon which they were engaged in manufacturing lumber, entered into a contract with S. whereby he agreed to manufacture into lumber all the timber on a certain lot for an agreed sum per thousand feet, with the right reserved to W. & W. and D. & C. to termininate the contract at any time by paying S. for the labor done, and for certain improvements placed upon the land. M. engaged to raft said lumber to market at a stipulated sum per thousand feet. Payments from time to time were made by W. & W. and D. & C. to S. and M. to apply on their respective contracts. Afterwards, on June 15, 1821, W. & W. conveyed to D. & C. for a valuable consideration all their interest in said lands, the parties agreeing in writing that all accounts and transactions of a prior date should be settled within ninety days; said settlement to be made upon the basis of the legal and equitable rights of the parties, and according to the fac's then existing; D. & C. agreeing to fulfill and perform the existing contract with 8. for the manufacture of lumber in all things yet remaining to be done on the part of the said W. & W. Held, 1. That the agreement by D. &. C. to fulfill and perform the existing contract with S. in all things yet remaining to be done on the part of W. & W., has exclusive reference to lumber to be manufactured in the future. 2. That parol evidence to show a different understanding of the parties is incompetent. 3. That in the settlement of all accounts and transactions of a prior date, D. &C. are entitled to credit for all sums paid on account of lumber manufactured prior to the date of the contract. Judgment reversed. Opinion by BOYNTON, J. -Chattle v. Whitney.

ABSTRACT OF DECISIONS OF SUPREME COURT OF WISCONSIN.

August Term, 1877.

HON. E. G. RYAN, Chief Justice.

ORSAMUS COLE,
WM. P. LYON,
Associate Justices.

Parties to Action.—1. Where land is taken under government patent in the name of the wife, but the husband receives the proceeds and crops as his own, the husband and not the wife must sue for injury to the proceeds and crops. 2. A wife who permits her husband, without objection, for a long series of years, to raceive and appropriate to his own use, or to their joint use, the income of her separate estate, can not compel him to account to her therefor until such per-

mission is revoked by her, and then only from the time of such revocation. Opinion by LYON, J.—Lyon v. The Green Bay and Minnesota R. R. Co.

MALICIOUS PROSECUTION-EVIDENCE-TERMINA-TION OF PROSECUTION-PECUNIARY CONDITION OF DEFENDANT. -1. To maintain an action for malicious prosecution it is essential that the plaintiff prove, (1) that the defendant prosecuted him maliciously, (2) that the prosecutor had no probable cause to believe that he was guilty of the offense charged, and (3) that the prosecution has terminated. 2. The termination of the prosecution must be proved by showing the final judgment or order of the court in which it was pend-3. Where a jury may properly award exemplary damages in their discretion it is the settled law in this state that in such an action, testimony of the pecuniary circumstances of the defendant is competent. Richard v. Booth, 4 Wis. 67; Barnes v. Martin, 15 Wis. 240. Opinion by LYON, J .- Winn v. Peckham.

REAL ESTATE-DEED HELD BY THIRD PERSON. Where a deed has been delivered by the grantor to a third person with instructions to deliver the same to the grantee on the happening of a future certain event as the death of the grantor or some other personand such conditional delivery is assented to by the grantee, if the grantor reserves no control over the deed he can not, after such delivery, recall it, but the grantor is entitled to it upon the happening of the event, although there is no valid executory contract to support it. But a deed so deposited with a third person to be delivered to the grantee on the happening of some event in the future which may or may not happen, does not pass title to the land described in it to the grantee until such event occur, and then only from that time, as perhaps from the actual delivery of the deed to the grantee after the event has transpired. Opinion by LYON, J .- Campbell v. Thomas.

ACTION FOR DEFAMATION - PARTIES .- 1. Where words of defamation, actionable per se, are spoken concerning a married woman, or concerning a woman who afterwards marries, the action should be brought in the name of the husband and wife. 2. Action for defamation by words imputing to the plaintiff, a female, want of chastity. When the action was commenced, the plaintiff was unmarried and under twentyone years of age. She afterwards married the son of the defendant. After answer, the defendant and the husband of the plaintiff applied, by sworn petition and affidavit, to the circuit court where the action was pending, stating that the plaintiff was then over twentyone years of age,-was the wife of one of the petitionand asking that the husband be made a party plaintiff, and that the suit be thereafter prosecuted in the names of the husband and wife. The circuit court changed the title of the suit by inserting the married name of the plaintiff, but denied the application to make the husband a party plaintiff. Held, error. make the husband a party plaintiff. Opinion by COLE, J .- Gibson v. Gibson.

PROMISSORY NOTE — CONTRACT OF INDORSER — EXCUSE FOR NON-PRESENTMENT TO MAKER—EVIDENCE TO VARY CONTRACT OF INDORSEMENT.—1. The implied contract of an indorser in blank of a promissory note payable generally is, that he will pay the note to the holder if the maker fails to do so, provided the note at maturity be duly presented to the maker for payment, and due notice of non-payment is given to the indorser. Under circumstances, however, the failure so to present the note for payment will not release the indorser from liability if he have proper notice that the note is unpaid. If, in the exercise of due diligence, the holder is unable to find the maker, or ascertain his residence, or if the maker resides out of the state, presentment to him for payment is excused

and the liability of the indorser remains. 2. A gives his promissory note to B. B indorses it in blank befere maturity and transfers it to C. C does not present it to A for payment, giving as excuse therefor, that he was told by B that he (B) "believed A was in Nebraska, as he had recently received a letter from A dated as postmarked there." It does not appear whether B made this statement before or after the note was due, and there is no proof that C made any search for A. Held, that B was discharged from liability as indorser. 3. Evidence is not admissible in an action by a bona fide holder against the indorser to prove a parol agreement between the indorser and maker that the indorsement should be without recourse. Opinion by LYON, J .- Eaton v. Mc Mahon.

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

May Term, 1877.

HON. SAMUEL E. PERKINS, Chief Justice.

"HORACE P. BIDDLE,
"WILLIAM E. NIBLACK,
"JAMES L. WORDEN,
"GEORGE V. HOWK,

Associate Justices.

APPEAL TO SUPREME COURT—PRACTICE.—1. Where the appellant, in his brief, does not discuss an error assigned on appeal, the supreme court will consider it as waived. 2. The giving of erroneous instructions to the jury may be assigned as a cause for a new trial in a motion addressed to the court below; but where no such motion for a new trial has been made, the action of the court below can not be assigned as error in the supreme court. Opinion by Howk, J.-Eckleman v. Miller.

WEIGHT OF EVIDENCE-WRITTEN INSTRUMENT-PAROL PROOF OF CONTENTS .- 1. Courts ought not to weigh evidence by the number of witnesses alone. The evidence of one witness, even though a party, may often be entitled to more weight than that of a dozen adverse witnesses. The judgment of the court below. on the weight of evidence, will be upheld in the supreme court. 2. When a party purposely, and apparently with a fraudulent design, destroys a writing, he will not be permitted to give parol evidence of the contents until he has offered evidence to rebut the suspicion of fraud arising from his act. Opinion by Howk, J.-Randolph v..Lane

CRIMINAL LAW-EVIDENCE-FORMER CONVICTION. The defendant was prosecuted under two indictments for selling liquor, both fixing the sale one day and neither designating any particular part of the day. On the trial upon the second indictment, defendant proved that he had already been convicted on the first indictment. Held, the facts did not prove an actual former conviction for the same offense, but was sufficient to show a previous jeopardy, and that the prosecutor should have elected as to which sale he would direct the evidence on each of the trials, so that the records might show an acquittal or conviction on each alleged sale. Opinion by Perkins, C. J.-Brinkman v. The State.

CRIMINAL LAW-NEWSPAPER OPINION-LARCENY-FELONIOUS INTENT.—1. An opinion as to the guilt or innocence of the defendant, formed upon newspaper accounts alone, and which, in the belief of the person expressing it, would not have any influence upon him in the trial of the cause, does not disqualify him to sit as a juror. 2. The snatching of bills from a person having them in possession, and retaining them without the consent of such person, does not necessarily constitute larceny. To constitute this offense the taking must be felonious, and the felonious intent must exist at the time of the taking. That intent must be determined by the jury, upon all the facts and circumstances of the case. Opinion by Perkins, C. J.—Hart v. The

TAXES-REPAYMENT OF-LEGISLATIVE POWERS .-Without some statutory provision, taxes voluntarily paid can not be recovered back. 54 Ind. 83. In 1853 a statute was enacted which enabled the tax-payer to recover back money paid for taxes on land not taxable, but in 1877, pending the action of the court below in this case, an act was passed expressly taking away such right of action. Acts 1877, Reg. Ses. 139. If a right of action, not existing at common law, is given by statute, and the statute is repealed without any saving of pending actions, the repeal takes away the right of action in such pending causes. The legislature has the power to take away by statute a right given by statute, unless rights have become vested under the law before its repeal. There was no such vested right here. The law of 1853 was a simple statutory provision which might be repealed at any time. Opinion by WORDEN, J. Board of Com'rs of St. Joseph Co. v. Ruckman.

LIQUOR LAW-WHEN SALE COMPLETE-BAILMENT. On the trial of the cause the court gave the following instruction: "The evidence in this case shows that the sale, as by the terms of the contract, was for a quart at a time, but frequently the party purchasing would take a half-pint at a time, leaving the residue of the amount purchased to be delivered when he might come again. If from the evidence you are satisfied that it was an effort to evade the law, it was no defense," etc. Held, the instruction was error. If, when the liquor was bought, it was drawn from the cask into a bottle, and thus separated from the bulk, and was set away and charged to the purchaser, the title to the whole quart passed to him. though he took only a part of it at the time of sale. There was nothing further for the vendor to do to identify the thing sold. 1 Ind. 336. The residue left by the purchaser was at his own risk and the vendor was only responsible for it as bailee. The vendor could recover for the whole quart whether the buyer ever came for the residue or not. Actual delivery of the thing sold is not necessary to pass the title to purchaser. If the sale was of a quart at a time the defendant could not be guilty of selling by a less quantity than a quart at a time, no matter what may have been his motive in making the sale. Opinion by WORDEN, J.—Dobson v. The State.

ABSTRACT OF DECISIONS OF SUPREME COURT OF NEBRASKA.

October Term, 1877.

HON. GEORGE B. LAKE, Chief Justice. DANIEL GANTT, SAMUEL MAXWELL, Associate Justices.

APPEAL FROM COMMISSIONERS TO ASSESS DAM-AGES.-In taking an appeal from the assessment of damages for land appropriated by a railroad company, to the district court, the appellant is not required by the statute to execute an appeal bond. Nor is it necessary in such an appeal to file pleadings in the case in the district court. Judgment reversed. Opinion by GANTT, J .- Neb. R. R. Co. v. Van Deusen.

FORMER CONVICTION. - Where the charge against the prisoner, in a police court, was petit larceny, and the jury returned a verdict of "guilty" and fixed the value of the property stolen at \$35.00, held, that this verdict was no bar to an indictment for larceny in the district court for stealing the same property, as no valid judgment could have been rendered thereon. Judgment affirmed. Opinion by Lake, C. J .- Thompson v. State.

VALIDITY OF PROCEEDINGS IN ATTACHMENT. Where property is seized under an order of attachment, and no question of ownership is raised, nor any fraud or collusion charged, final judgment in the action concludes all enquiry by third persons concerning the validity or regularity of the proceedings, no matter how erroneous they may have been, providing the court has jurisdiction. Opinion by LAKE, C. J.— Rudolph v. McDonald.

DOUBLE DAMAGES .- A partial law which proposes to affect or destroy the rights of particular persons or a particular class of persons is not the law of the land; hence that part of the statute which gives the owner of live stock "double the value" of his property accidently injured or destroyed on a railroad track is void. Judgment reversed. Opinion by GANTT, J .- A. & N. R. R. Co. v. Baty.

JUDGMENT NON OBSTANTE. - Where a plea or replication is good in form only, but is bad in substance, and constitutes neither a bar nor answer, and issue is taken on it, and the verdict finds it true, such verdict leaves the cause of action or bar unanswered and confessed, and judgment non obstante should be entered for him whose cause of action or bar is confessed; and the rule applies to equity cases when the issue of fact raised by the pleadings is submitted to the considera-tion of a jury; but in either case, such judgment or decree can only be rendered in a very clear case. Judgment reversed. Opinion by GANTT, J. - Oades v.

TAXATION OF UNIMPROVED CITY PROPERTY. -All property within the limits of a city as incorporated which is taxable according to the laws of the state is subject to taxation by the municipal corporation for general purposes. The court can not classify the property, within the limits of such city or the district, into such as shall be taxable and such as shall be exempt from taxation. Neither can it pronounce an act of the legislature void merely because it may be imperfect or impolitic, or for any supposed inequality or injustice in its operation, if it be upon a subject-matter fairly within the scope of legislative authority. Judgment reversed. Opinion by Gantt, J.—Turner v. City of Omaha.

ABSTRACT OF DECISIONS OF SUPREME COURT OF ILLINOIS.

June Term, 1877.

[Filed at Mt. Vernon, Oct. 9th, 1877.]

HON. JOHN SCHOLFIELD, Chief Justice.

T. LYLE DICKEY,
BENJAMIN R. SHELDON,
PINCKNEY H. WALKER,
JOHN M. SCOTT,
ALFRED M. CRAIG,

Judges.

PRACTICE-JUDGMENT AGAINST OBLIGORS-BANK-RUPT OBLIGOR .- Where one or more of several obligors or promissors are bankrupt, the proper practice is to take judgment against all of them, the judgment being stayed as to the bankrupt, until the question of his discharge is determined. Opinion by WALKER, J .-Byers et al. v. First National Bank.

CONTESTED ELECTION-UNREGISTERED, BUT UN-CHALLENGED VOTERS .- In the contest of the result of an election, in order to establish the illegality of certain votes, it is not sufficient to show merely that the parties casting these votes were unregistered, and did not furnish proof that they were entitled to vote. It must appear that these parties were challenged, or some objections made to their voting, otherwise the pre-

sumption is that they were legal voters, and so known to the judges of election. Dale v. Irwin, 78 Ill. 170. Judgment reversed. Opinion by Sheldon, J.—Kuykendall v. Harker.

PARTITION SALE-ALLOWANCE OUT OF PROCEEDS FOR DEBTS OF THE ESTATE.—A sale was made of certain lands not susceptible of partition, that a partition might be made in money, and it was decreed that of the proceeds of such sale a sufficient sum should be paid to the administratrix of the person from whom the lands descended, for the payment of the debts allowed against him, which were proved up and allowed against the estate. Held, that such an order was proper, as it would be unjust to the purchaser to have the money paid to the heirs, leaving the premises liable to be again sold to pay debts. The heirs are deprived of no right, and the premises would doubtless bring more to them than if sold subject to the debts of the estate. Opinion by WALKER, J.-Labadie v. Hewitt.

ABSTRACT OF DECISIONS OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

March Term, 1877.

HON. HORACE GRAY, Chief Justice.

" JAMES D. COLT,

SETH AMES, MARCUS MORTON,

Associate Justices.

WILLIAM C. ENDICOTT, OTIS P. LORD, AUGUSTUS L. SOULE,

CRIMINAL LAW-CUMULATIVE SENTENCE.-Where a general verdict of guilty has been rendered upon an indictment containing several counts for distinct offenses, and a sentence of imprisonment has been awarded against the defendant upon some of the counts, under which sentence he has been imprisoned, he can not, at a subsequent term, be brought up and sentenced over upon another count in the same indictment. Opinion by GRAY, C. J .- Com. v. Foster.

TRUSTEE PROCESS-TRUSTEE'S COSTS.-In trustee process, where the issue whether the trustee should be charged or discharged depends upon the question whether an assignment of the funds in the trustee's hands to one who has been summoned as claimant, was valid, the trustee has a direct interest in that question and a right to be heard upon it, and is entitled to costs while attending for that purpose the court in which it was pending. The case differs from one where no claimant intervenes, and the whole litigation, after the filing of the trustee's answer, is between the plaintiff and defendant, in which the trustee has no occasion and no right to be heard. Gen. Sts,, ch. 142, secs. 60-62; Crawford v. Mass. Cotton Mills, 15 Gray, 70; Morrison v. McDermott, 6 Allen, 122; Wasson v. Bowman, 117 Mass. 91. Opinion by Gray, C. J.—Washburn v. Clarkson.

CONTRACT-BY-LAW OF CORPORATION .- A by-law of the defendant bank provided that, "as the officers of the institution may be unable to identify every depositor, the institution will not be responsible for any loss sustained, when a depositor has not given notice of his book being stoien or lost, if such book be paid, in whole or in part, on presentation." *Held*, that the plaintiff, when he made his deposits, assented to the by-law, and can not recover his deposits if the bank, in good faith and without negligence, has paid the amount sued for, upon presentation of the plaintiff's book, to some person who had stolen or otherwise obtained possession of it, and who fraudulently personated the plaintiff, no notice that the book was stolen having been given to the bank. Wall v. Prov. Inst. for Savings, 3 Allen, 96; Levy v. Franklin Savings Bank, 117 Mass. 448. Opinion by MORTON, J.—Goldrick v. Bristol Co. Sav. Bank.

AGREEMENT TO ASSUME MORTGAGES.—Where the defendant accepted a deed, by the terms whereof he assumed and agreed to pay certain mortgages on the real estate therein conveyed, but the grantor transferred no money or fund to the defendant, and the latter made no express contract with the mortgages or their assigns, no action at law will lie by them against him to recover the amount due on the mortgages. Mellen v. Whipple, 1 Gray, 317; Exchange Bank v. Rice, 157 Mass. 37; Pettee v. Peppard, 120 Mass. 522. Felch v. Taylor, 13 Pick. 133, and Adams v. Adams, 14 Allen, 65, commented upon and explained. Opinion by Grav, C. J.—Prentice v. Brinehall.

NEGLIGENCE-MASTER AND SERVANT-PARTNER-SHIP .- 1. In an action against a master for an injury sustained by one of his servants while engaged in the master's business, the plaintiff must show a neglect of some duty on the part of the defendant, which he owed to the plaintiff, while so employed, and which was the sole cause of the injury complained of. 2. If the negligence relied on was the negligence of a fellowservant while engaged in the same general business, or in a service which constituted part of the common employment, although of a higher grade, the plaintiff can not recover. 3. Where the work, which was the laying of sewer pipes, was committed to the supervision of a skillful and competent superintendent, and required for the protection of the men the frequent use of temporary structures, the location and erection of which, as the digging progressed, was a part of the work in which the superintendent and the men under him were alike employed, the master is not liable for a defect in the preparation of such structure, unless there is something to show that he assumed it as a duty independent of the servant's employment. The occasional presence of the master as the work went on would not be enough to charge him with this duty. Summersell v. Fish, 117 Mass. 312; Johnson v. Boston, 118 Mass. 114; Hodgkins v. Eastern R. R., 119 Mass. 419; O'Connor v. Roberts, 120 Wall. 227; Kelley v. Norcross, 121 Mass. 508; Harkins v.Standard Sugar Refinery, 122. The fact that the superintendent was to receive one-half of the profits as compensation for his work, would not constitute him a partner of the employer. Ryder v. Wilcox, 103 Mass. 24; Demey v. Cabot, 6 Met. 82. See Arkerson v. Dennison, ≥ 117 Mass. 407. Opinion by Colt, J.—Zeigler v. Day.

SEAMEN'S WAGES-REMEDIES TO RECOVER-EVI-DENCE -1. The general rule is everywhere recognized that a seaman has a three-fold remedy for his wages,against the master, the owner, or the ship,—and may proceed, at his election, against either of the three in admiralty, or against the master or the owner at common law. The Jack Park, 4 C. Rob. 308, 311; Aspinwall v. Bartlet, 8 Mass. 483, 486; Abb. on Shipping, pt. 5, ch. 4; 3 Kent Com. 196; The Solacia, Lush. 545, 548. The reason commonly assigned for the liability of the master is that, according to the usual practice in the merchant service, the master makes an express contract with the seamen. Bayley v. Smart, 1 Salk. 33; Bush v. Rawlinson, 1 Bro. P. C. (2d ed.) 137; Mayo v. Harding, 6 Mass. 300; Bishop v. Sheppard, 23 Pick. 492, 495; Wysham v. Rowen, 11 Johns. 72. The English statutes and our own, from early times, have provided for such contracts. Sts. 2 Geo. II, ch. 36; 2 Geo. III, ch. 31; 17 & 18 Vict., ch. 104, sec. 149; Mass. Col. St. 1668,—4 Mass. Col. Rec., pt. 2, 399, 391; Auc. Chart. 717, 718; U. S. St. 1790; U. S. Rev. Sts., sec. 4520. It is not to be presumed, without the most positive and satisfact of the control factory proof, that the crew gave exclusive credit to the owner. Story Ag., sec. 299; U.S.v. Haines, 5 Mass. 272, 275. 2. The only witness produced testified as follows: "I am a constable of the city of Boston. I know plaintiff and defendant. Plaintiff, about six months ago, came to my office with another seaman, and asked me to go to East Boston with him to see defendant. I went as requested and saw, in presence of the plaintiff, the defendant on board his ship. I asked him if he was willing to discharge the plaintiff, pay him off and give him his clothes, and he said he was willing to do so, and gave directions to his mate to deliver the clothes asked for. Held, that this evidence was sufficient to maintain the action against the master for the plaintiff's wages. Opinion by Gray, C. J.—Temple v. Turner.

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

July Term, 1877.

HON. ALBERT H. HORTON, Chief Justice.

D. M. VALENTINE,
D. J. BREWER,
Associate Justices.

INTER-STATE COMMERCE. — Section 6 of the act of the Legislature of Kansas of 1876, entitled "An act for the protection of birds," Laws of 1876, 183-4, so far as it prohibits the transportation from Kansas to other states of prairic chickens which have been lawfully caught and killed, and thereby lawfully become the subject of traffic and commerce, is unconstitutional and void, being in contravention of that provision of section 8, article 1, of the Federal Constitution, which declares that "Congress shall have power * * 3. To regulate commerce * * among the several states." Judgment reversed. Opinion by Valentine, J.; all the justices concurring.—State v. Saunders.

ADMINISTRATION-RIGHTS OF CREDITORS-WILL.-1. Where A exhibits his demand against the estate of a decedent by causing a notice and statement of the amount due him to be served upon the administrator, and thereafter takes no further steps to have his demand allowed or established during the administration of the estate, and such administration continues over four years from the date of the letters of administration granted in the case, and said administrator makes a final settlement of such estate, which final settlement is approved by the probate court, and thereon the said administrator is finally discharged, and no claim is made of error, fraud or concealment as to said final settlement, or the discharge of the administrator; Held, that said A can not maintained his action in the district court against the heirs of the deceased, to whom lands have descended from him, to have his demand adjusted and allowed, and said lands sold to satisfy the same. 2. Where a creditor of a decedent has actual notice of the appointment of an administrator, treats with such appointee as the legal administrator, and exhibits to him his demand against the estate of such deceased person, he can not thereafter complain that he has been misled, or prejudiced by the neglect of such administrator to give the notice required by sec. 74, ch. 91, p. 523, of Com. Laws of 1862. 3. An administrator is merely the agent or trustee of the estate of the decedent, acting immediately under the direction of the law prescribing his duties, regulating his conduct and limiting his powers. 4. An agreement between a creditor of an estate and the administrator thereof, to the effect that no further action should be had in Kansas towards the establishment of a demand of the creditor, beyond legally exhibiting to said administrator said claim, until the determination of a suit pending in another state, on the same claim, against the executor of the same estate, and that the determination of said suit in such other

state should settle the matter here, is not binding on the estate, nor on the heirs of said estate. 5. The formal and general language in a will requiring that all the just debts of a deceased should be paid by his executors out of his estate, can not be successfully invoked in behalf of a person, who, having a just claim against such testator, neglects the legal proof of his demand until more than three years have elapsed after the issuance of letters testimentary, and the estate has been finally settled according to the provisions of the law and the administration closed. Judgment affirmed. Opinion by HORTON, C. J.; all the justices concurring.—Collamore v. Wilder.

SHERIFF'S SALES-INTEREST ACQUIRED IN LAND THEREUNDER-CONFIRMATION-JUDGMENT LIEN. 1. The rule enunciated in the case of White Crow v. White Wing, 3 Kan. 276, that where land has been sold on execution, any person claiming to be the owner thereof, and interested in defeating the sale, may, although he may not be a party to the suit, move the court to set aside such sale, cited and followed. 2. Where the public records, and all the written evidence applicable to the subject, apparently show that said and was subject to be sold on said execution, the moving party may, nevertheless, show by competent and proper parol evidence, embodied in affidavits, that the land was not in fact subject to be sold on said execution. 3. But such right of the moving party is subject to an extensive discretion in the court hearing the motion, and the final decision of the court upon such motion is not conclusive as to the ultimate rights of either of the parties. Trepto v. Buse, 10 Kan. 170, 179, 180. 4. A deed does not take effect until it is delivered; and it may be shown by parol evidence that a deed drawn up, signed, dated and acknowledged on May 24, 1875, was not delivered until June 5, 1875. 5. Mrs. A. and her husband occupied a certain piece of land as their homestead, she being in equity the owner thereof and he holding the legal title thereto. They agreed with one H. that they would transfer the title to said land to H., and that he should then transfer the title to Mrs. A. In pursuance of this agreement they, on May 24, 1875, drew up, signed and acknowledged a deed conveying said land to H., but they did not deliver said deed until June 5, 1875. On that day H. executed and acknowledged a deed conveying said land to Mrs. A., and both of said deeds were then delivered at the same time. H. never had possession of said land, nor did he ever have any interest therein except as above specified. Held, that H. never had such interest in said land as could be held by the judgment lien of any of his judgment creditors, nor did he have any such interest as could be sold on execution. 6. A judgment lien attaches merely to the interest of the judgment debtor in the land and to nothing more, and the courts will protect every equity of third persons therein. 7. A purchaser of real estate at a sheriff's sale, who has notice of all the equities of third persons, can not take any greater interest in such real estate than the judgment debtor himself possesses. Opinion by VALEN-TINE, J.; all the justices concurring. Affirmed .- Harrison & Willis v. Andrews.

Practice as to Bills of Exceptions—Prejudice of a Judge—Jury—Justifiable Homicide,—i. Neither the certificate of the clerk of a district court, nor the agreed statement of counsel as to what occurred at a trial, can be made to supply the place of a bill of exceptions taken in accordance with the statute; and when matter is sought to be brought into the record by such means, it will be disregarded by the supreme court. 2. Where a criminal case was tried at the February term of the district court for 1876, and the regular term next after that of the trial commenced on the

29th of May, 1876, and a bill of exceptions of the proceedings of the trial was not presented or allowed, or signed, or filed, until June 5, 1876, and during the said May term; Held, That such bill of exceptions is unauthorized by law, and no part of the record; and, held, that a waiver by counsel of the time such bill of exceptions was taken, and the manner it was made will not cure the fatal defect as to said exceptions; and also held, that an order of said district court of the said June term, 1876, to have the said bill of exceptions entered as having been presented and allowed as of the previous term of the court is a nullity. The court has no power, by this mode, of extending the time for the making and signing and filing a bill of exceptions beyond the term. 3. Where the February term of the district court was continued to the 24th of May next thereafter, and the court did not convene on the said 24th, pursuant to adjournment, the court is legally open until it adjourns sine die, or expires by law. U. P. Railway Company v. Hand, 7 Kans., 380. 4. Neither unfavorable comments as to the innocence of a defendant in a criminal case, after a verdict of guilty by a jury, made by a trial judge upon the evidence introduced in the case when passing sentence upon such defendant, nor adverse rulings, nor errors of judgment, of themselves amount to prejudice on the part of a judge so as to compel a removal of the case upon a new trial (granted by the supreme court) to the district court of some county in a different judicial district. 5. The mere fact that a deputy sheriff was present at the county clerk's office to attend and witness the drawing of a jury, and, after such drawing, signed the certificate of the drawing with the county clerk and the two justices of the peace of the county, who also attended such drawing in accordance with section 11, general statutes 1868, 585, where the names of all the jurors were drawn from the jury box by such county clerk in the presence of all of said parties; Held, no cause to discharge or set aside the jurors so drawn. 6. Upon the trial of a defendant charged with murder, and the defense is made solely on the ground that the homicide was justifiable, as having been committed in self-defense; Held, That the instructions as to the defense are not erroneous when it clearly appears therefrom that the jury were directed that all the law demands is that there shall be reasonable apprehensions of imminent danger, and of the reasonableness of this apprehension the jury are to be the judges, but the threats and circumstances upon which this apprehension rests must not only tend to lead to the belief of such danger, but they must force the belief upon the mind, and then the belief must be reasonable and such as reasonable men act on. State v. Horne 9 Kans., 119. Judgment affirmed. Opinion by HORTON, C. J. All the justices concurring .- State v. Bohan.

ATTESTATION OF A FOREIGN JUDGMENT-OBJEC-TIONS TO TESTIMONY - CHARGE OF THE COURT-PECUNIARY DAMAGES FOR THE DEATH OF A PERSON -EXEMPLARY DAMAGES.-1. It seems that the attestation of a foreign record under section 905 of the Revised Statutes of the United States must be made by the clerk in person, and can not be made by a deputy or other person acting as a substitute for him. Morris v. Patchin, 24 N. Y. 394. 2. An objection to the introduction of testimony to be available in this court for purposes of error must, except perhaps in cases where the defect can not be obviated by further proof, distinctly and clearly state the point of objection, so that we can see from the record that the very matter to which our attention is directed was presented to the mind of the trial judge. 3. Where the charge of the court is in accord with the instructions asked by the party now alleging error, it will for the purposes of the case be conclusively presumed to be correct. 4. In

an action under section 422 of the Code of Civil Procedure (Gen Stat., p. 709) to recover damages for the death of party, and outside of the question of exemplary damages, the recovery is to be a pecuniary compensation for a pecuniary loss. 5. In determining the amount of such compensation much must be left to the good sense and sound judgment of the jury upon all the facts and circumstances of the case. No uniform and precise rule can be laid down for estimating the value to the survivors of the life of the deceased, for the elements which go to make up such value are personal to each case. 6. A charge to a jury, in such an action, that they are not to take into consideration the pain suffered by the deceased, or the wounded feelings of the surviving relatives, but may consider the relations between him and the next of kin, the amount of his property, the character of his business, and the prospective increase of wealth likely to accrue to a man of his age, with the business and means which he had, or the possibility of a decrease of the same is held, under the circumstances of the case, to present no error. 7. Where the jury find the pecuniary loss to be a certain sum, in this case \$1,320.00, and in answer to a specific question say that the loss consisted of notes and mining stocks and there is testimony that deceased had notes and mining stocks which were lost on account of his death, and amount of the verdict seems to be but a reasonable compensation for such loss, the verdict will be upheld although the amount named by the jury can not be deduced from the testimony by any mere addition of the items of an account, and although it is not made perfectly clear in what manner, whether by running of the statute of limitations or otherwise, the death of the deceased brought about the loss of the notes and stocks. 8. Where the testimony shows that the railroad train upon which the deceased was riding as a passenger was thrown from the track, and that thereby the decased received the injuries from which he died, and fails to show any unusual speed or want of eare in the management of the train, or, by any direct evidence, the cause of the train's being thrown from the track, and discloses as the only evidence of negligence on the part of the company the fact that some of the ties at and near the place of the accident were rotten. and it appear, that the company had a suitable and competent person in charge of the track at that place, as section boss, and that he was from time to time, and as fast as he deemed it necessary for the safety of the track, replacing the old and rotten ties with new and sound ones, held, that no case was shown for exemplary damages. Opinion by BREWER, J. All the justices concurring.—Kansas Pacific Ry Co. v. Cutter.

BOOK NOTICES.

THE LAW OF CORPORATE SECURITIES, as decided in the Federal Courts. By G. C. CLEMENS, of the Topeka Bar. W. J. Gilbert, St. Louis.

Probably no one then living will be surprised if the 999th edition of "That Husband of Mine" is printed on variegated paper, so that looking at the edges of the book, all the colors of the rainbow will appear, to please the eyes of the then so exquisitely cultivated tastes of its millions of fascinated readers. Such colors might contrast with Charley's "cut-away coat." In a law book, however, the profession usually look for, and are pleased only, with old-fashioned white paper, and any departure from this good custom fails to please the eye of the "learned reader." We think, then, that Mr. Gilbert has made an error in using a cheap straw-colored paper of several shades for the book before us.

The law of corporate securities covers a wide domain, and, when a writer proposes to condense all that even the federal courts have decided on this subject within

the covers of a small volume, he challenges criticism, and should not complain even if a reviewer should hurt his self-complacency, at seeing his work in print and "put upon the country," as Mr. Clemens so elegantly expresses it; yet at the same time should he receive all the more commendation for what is commendable, for true it is, as Mr. Clemens says, "it requires more time, labor and thought to write a small but comprehensive book, than to compile a massive and formidable looking volume, consisting of long and incomprehensible sentences and innumerable notes." We can not agree, however, with Mr. Clemens, that of necessity, "notes are the subterfuge of the indolent author," for the titles of many a treatise will at once occur to every one, in which the notes show the greatest painstaking research, and can not, by any possi-bility, have been "copied from some digest." How often, on the other hand, is it very evident that a writer not simply cites case after case in his text without fully understanding any of them, but frequently brings in such expressions as, "Similarly Lord Cranworth, in the House of Lords, in — v. —, says," or, "It was held by Knight—Bruce, L. J., affirming the decision of Page—Wood, V. C., that," etc.,—all for the purpose of making as large a volume as possible, with the limited material within his knowledge of the subject he has undertaken to handle.

"We live in a glorious country," writes Mr. Clemens in his introduction. Yes, truly, had it not been so, "They All Do It" could have never been written; but why this fact-of which we are all so proud on the fourth of July-should make the innocent purchaser of "The Law of Corporate Securities, as decided in the Federal Courts," willing to pay for and read a four-page tirade against universal suffrage, we fail to comprehend, even though we are invited "to take a sort of holiday excursion" before confining ourselves "to the dry law in the body of the work." Such expressions as "a system of government which recognizes every filthy blackguard as a 'sovereign,'" and "the 'elector,' a term which, in this country, is rapidly becoming the synonym of 'knave' or 'imbecile,'" are out of place, except it may be upon the stump, or in the columns of a partisan political newspaper-after an election in which "our opponents" were successful. A treatise on "The Law of Corporate Securities, as Decided in the Federal Courts," published in St. Louis, should not contain them.

On page 23 our author gives us ten "principles," as embodying the law of municipal bonds. This is a dangerous method of dealing with a legal subject, unless the writer at once cites cases which will sustain his "principle," for, except to the mind of the veriest tyro, there will immediately arise queries which will not be answered except by a careful study of cases; and, even if the general principles enunciated are accepted, the inquiring—and perhaps not "learned"—reader will divide and sub-divide, perhaps involuntarily, and ask for cases to sustain each separate proposition. The editor of Fonblanque's Equity, while acknowledging the great learning of the unknown writer of that work, still confesses himself at a loss to find cases to sustain many of the author's statements. Theory, and what the writer thinks the law should be, are apt to take the place of the law as it is.

"Negotiable bonds and coupons are commercial paper." Granted. But what constitutes a negotiable bond? What a negotiable coupon? When does a bond or a coupon—together or separate—pass from the class of commercial paper to that of non-negotiable instruments? Are bonds by their terms, not due, but having overdue coupons attached, negotiable? This "principle" covers too much ground. A law book can not be written like an axiom in mathematics.

"A decision of a state court, which impairs the obligation of a pre-existing contract, is as much a violation of the Federal Constitution as a statute doing the same thing." On page 33 the author cites authorities to sustain this "principle," but yet we must confess that a rather careful perusal-not of a digest, but-of the reported cases of R. R. Co. v. McClure, 10 Wall. 511; Bethel v. Demarest, 10 Wall. 537; Knox v. Exchange Bank; 12 Wall. 379, leads us to think that the holding of the supreme court in the case relied on, Butz v. City of Muscatine, 8 Wall. 584, is considerably modified by the later cases, and do not furnish sufficient authority for the "principle" as enunciated by Mr. Clemens. "This test of principles might be extended—and it is not as full as the author would desire to make it-but he fears he has already traveled too far on an unbeaten Yes.

Dividing his work into two books, our author treats first of municipal, and then of railway securities, and in the first book of municipal and legislative powers, conditions precedent to the issuance of bonds, subscriptions, bonds and coupons, provisions for payment, pleading, practice and evidence, mandamus, proceed-

ings in equity, and municipal warrants.

In the second book we have chapters on corporations, railroad bonds, railroad mortgages, what may be mortgaged, statutory mortgages, priority of mortgages, receivers, and then follow over fifty pages of what we must be excused for calling "padding," consisting of chapters regarding the Federal circuit courts and the practice in equity therein, and reprinting in full the equity rules prescribed by the Supreme Court.

If Desty's Federal Procedure—an example of "multum in parso"—or Abbott's U. S. Practice were not to be readily obtained, some one might be found willing to pay twenty-five cents for Mr. Clemens' "Chancery Rules and Practice;" but as these books are so easily obtainable, these fifty pages are out of place in a work on "The Law of Corporate Securities," especially when such a work is published in St. Louis. If these "Chancery Rules" are an essential part of Mr. Clemens' work, would it not be best to bind in a new title-page reading, "Clemens' Treatise," without specifying any subject?

Mr. Clemens devotes ten pages to the subject of Receivers. Of necessity he can but hastily speak of a very few of the questions which arise on this very important subject. So far, however, as he does notice them, he generally gives apt citations to sustain his point—though it strikes us a little odd to see Stauton v. Alabama and Chattanooga R. R. Co., 2 Woods, 507, cited to sustain Kennedy v. St, Paul and Pacific R. R. Co., 2 Dill. 348, or the latter to sustain the proposition that if a land grant is about to be forfeited, then a court of equity has power to authorize the issue of receivers' certificates, for the purpose of completing

the road and so prevent such forfeiture.

"Over-due interest coupons are entitled to no priority over bonds of the same class, but both bonds and such coupons must share the proceeds pro rata, if they are insufficient to pay in full," and Dunham v. Railway Co., 1 Wall. 268, is cited. Now it so happpens that in the last paragraph on this page, 268, 1 Wall. are found, "Terms of the mortgage are," etc., and Mr. Clemens' axiom is not supported by his cited case, unless he materially modifies it. An interesting discussion of this subject, and on general principles, by the learned District Judge for the Southern District of New York, is found in 18 Blatchford, which it might be pleasant for Mr. Clemens to read when studying up for a second edition of his "Treatise."

We do no wish to be severe on Mr. Clemens, but we take the liberty of saying, that if he will carefully study Angell and Ames on Corporations, Dillon on Municipal Corporations, Brice's Ultra Vires, American edition, Dillon on Municipal Bonds, Redfield on Railways, High on Receivers, Daniell on Negotiable Instruments, and Lacey's Digest of Railway Law, not neglecting to carefully read and compare all the cases cited, even those in the notes, we will be glad to read his second edition.

In the meantime, however, it may be misleading for any young "practitioner in railway bond and mortgage cases," or municipal bond cases either to rely too implicitly on Mr. Clemens' endeavor to extricate the law of corporate securities out of the "chaotie state" in which he says he found it. C. W. H

HILLIARD'S AMERICAN LAW.—A Comprehensive Summary of the Law in its Various Departments by Francis Hilliard. In two Volumes. Vol. I. New York: Ward & Peloubet. 1877.

The first volume of this work contains over 500 pages, and in its arrangement follows substantially the Commentaries of Blackstone. It is elementary in its scope and will be found of much service to the beginner; in fact as a law primer it might well take the place of several late ventures in this particular line. The present volume treats, in four books, of the absolute and relative rights of persons, the origin and constituents of American law; the rights of things personal and of things real. The second volume is announced to appear in December.

CORRESPONDENCE.

A WRIT OF ERROR CORAM NOBIS.

To the Editor of the Central Law Journal:

A notice of the 7th edition of Angell's Watercourses in the last number of the CENTRAL LAW JOURNAL (Nov. 2), by some singular misadventure, seems to attribute to it a preface which manifestly belongs to some other book, probably Mr. May's edition of Greenleaf's Evidence, or some other work on that subject. That which follows the quotation marks, on page 396, I presume, is intended for Angell. Of the three cases supposed to be missing from Angell, one (Dumont v. supposed to be missing from tangen, the vol-Kellogg, 29 Mich. 420), I have cited twice in the volreported decisions of the Supreme Court of Michigan are much too valuable to be overlooked, especially an important decision like that above, by Judge Cooley: Another (Field v. Brown, 24 Grattan, 74), seems not to make any material advance on Nichols v. Aylor, 7 Leigh, 546, decided in the same court, and in which the principle is much more fully developed. The other, (Smith, Attorney-General v. The Evart Booming Co. 3 Cent. L. J. 787), deals mainly with Purprestures, a subject specially treated by Mr. Angell, in his work on Tide Waters, a new edition of which is sometimes proposed; and it was thought best to leave that subject for the treatise for which it was assigned by the author. I have no doubt, however, that it would, to a great extent, be pertinent to either volume; at all events, the case above last noticed (3 Cent. L. J.), contains much useful information. and would be excellent good read-

The idea of citing cases from the law journais, I have acted on increasingly for the last two years, and believe it to be a good one. This note has been written chiefly to call your attention to the mistake about the preface.

I am a constant and attentive reader of your journal. I hold it in the highest estimation.

Very respectfully and sincerely yours,

J. C. PERKINS.
SALEM, Mass., Nov. 6, 1877.
[The judicial machinery of the country is fortunately

provided with appellate tribunals, whose office it is to correct the blunders of the inferior courts. But when the editor of a law journal commits a blunder, the only remedy is a writ of error coram nobis preferred before the editor himself. When such a suit is prosecuted before an upright judge, he will always dismiss pride of individual opinion acknowledge his error, if he finds he has committed one; and an honest editor will, under like circumstances, be frank to confess a blunder. By some unaccountable mixing of copy, in our notice of the last edition of Angell on Watercourses, we quoted from the preface of Mr. May's Edition of Greenleaf on Evidence; and therefore, on the writ of error coram nobis, which Judge Perkins presents before us, we give judgment for the petitioner, and the court will set up the—costs.—ED. C. L. J.]

NOTES.

THE St. Louis ordinance taxing lawyers has been declared unconstitutional by the court of appeals.

CONGRESSMAN GLOVER, of Missouri, has introduced a bill in the House of Representatives providing for the admission of women to practice in all the courts of the United States upon the same terms as men.

THE late Senator Morton was educated at Miami University, Ohio, and was admitted to the bar in 1817. He comenced practice in his native state, but was not at first successful. At the end of ten years, however, he had a very lucrative business. He was chosen circuit judge in 1852, but did not long continue on the bench.

ADDING TO THE LAW.—A clergyman was applied to to perform a marriage ceremony, to which application he of course cheerfully assented. On the completion of the ceremony he was asked by the groom the price of his fee. On replying that the law allowed him two dollars, he was generously presented by the interrogator with fifty cents, accompanied by the persuasive injunction: "Here, take this; that'll make it two dollars and a halt."

Some Interest has been excited by recent events in the question as to how, according to English law, the amount of salvage is to be estimated which was earned by the Fitzmaurice in rescuing the Cleopatra obelisk and vessel. The value of the property saved is but one of the ingredients of salvage service, and it is only as to this ingredient that the case is a peculiar one; but it must be admitted that it is a difficult question to say in what manner the obelisk is to be valued. On the one hand it would be unfair to value it simply as a block of granite, and on the other it seems atmost impossible to put a value upon it as a work of art or upon its historical associations. We are not aware of any reported salvage case in which the property saved has had what might be called a fancy value. There is high authority for saying that a valuation in a policy of insurance on the ship or goods saved is prima facie a mode of ascertaining the value for salvage (1 Park on Insurance, 372); but it is understood that, while Mr. Dixon's interest in his contract was insured to some extent, no insurance was effected on the obelisk.—[Solicitor's Journal.]

THE value of a precedent as an authority in the practitioner's favor, or its importance against him, is so often impugned by the assertion that it is a dictum, that it becomes important to have a correct estimate of what constitutes a dictum. There are three different tests adopted by different classes of jurists, and between these three every variety and degree of loose notion on this point. The strictest rule considers everything as dictum except the narrowest point of law necessarily decisive of the case. The next larger rule is to consider every point that might properly have been decisive of the case, and which was actually presented to the court, and expressly stated by a majority of the court as the ground, or one of several grounds, for its disposition of the case, as an authority for the decision—and consequently everything not so involved, though presented and passed on, as dictum. The largest rule is to consider that the authority of the case extends beyond either of these limits to the ratio decidend—the reasons or philosophy of the point or points thus decided. Which rule should be practically followed depends partly on the relation of the tribunal by which the decision was render-

ed to the tribunal in which it is cited. The court of last resort may well apply the first and narrowest rule to the opinions of the lower courts, while they, on the other hand, follow, as effectual decisions, incidental and minor rulings of the court of last resort.—[Daily Register.

In arguing a motion to disbar an attorney before the Supreme Court of New York last week, Mr. Delaifeld, the prosecuting counsel in the case, spoke as follows in respect to recreant lawyers: "It is not pity, it is not charity to condone the faults of the lawyer who is recreant to his trust. It is nothing but mawkish sentiment that can ex-tenuate or pardon those crimes. Many of the difficulties of this problem have been lately solved by the Incorpor-ated Law Society of London, at whose instance, in one year (1874), six solicitors were stricken from the rolls, three cases were referred to masters for report, and four were abandoned in consequence of the flight of the delinquents. In the State of New York it is rare to disbar an attorney; but the difference is due to moral weakness and not to any superiority of our attorneys over their English brethern. The best interest of society requires that the good lawyer should be treated with the highest respect, and the bad one punished with the utmost severity. Thus alone can the punished with the utmost severity. Thus alone can the bar be purged of its dross and raised to the position it should hold. In determining these cases courts should be cold as icicles and rigorously just. Lawyers are intrusted by the State with a great and valuable monopoly and un-usual immunities. They alone are allowed to represent the people in the courts in the pursuit or defense of fortune, they alone oppose a barrier to persecution and op-pression, and almost every man at some period of his life must depend upon them in defense or pursuit of property or life or rights dearer than either. No friend, no relative, however dear, no doctor however learned, is, in those emergencies, permitted to intervene. The State distinctly says that is all of these matters the citizen who can not protect himself shall employ a lawyer and none other. The monopoly is absolute, the privilege is exclusive. In return for this monopoly they must have approved character and learning. The moment these considerations fail, the privilege should cease. The great truth which must ever govern these case is, that of those to whom much is given much shall be required."

CHALLENGES PROPTER AFFECTUM.—It is the custom in some parts of the world to keep a copy of the statute book chained to the bench in the courts of law, in order that the judges may have the letter of the law always before them. If, in addition to the statutes, a few useful text-books—or say a copy of "The Pocket Lawyer"—were chained to the bench of the supreme court, manifest good would result. As, for example, let us note an occurrence at the recent trial of an action for damages against the Corporation of the City of Dunedin, before Mr. Justice Johnston. An intelligent juror rose in the box, and wanted to know whether the jurors were competent to sit, as they were citizens and ratepayers, and therefore interested. The learned judge remarked that the question took him somewhat aback; that the same thing must have occurred "hundreds and hundreds of times before;" and that uniess one of the parties to the action objected to the jury, he supposed they could sit. The five learned counsel retained in the cause were not prepared with any authority; and it was agreed that the jury should be sworn. The trial proceeded and lasted for four days, when the jury were discharged, being unable to agree. The intelligent juror was quite right in his view of the question. Among the four grounds of challenge to the polls specified by Coke—Co. Litt. 187 A—is the challenge propter affectum—supposed that or partiality; and among the instances of it given by Coke is the following:—"If a body politick or incorporate, sole or aggregate of many, bring any action that concerns their body politick or incorporate can have no kindred), yet for that those bodies consist of naturall persons, it is a principall challenge." Any interest in the action, direct or collateral, is ground of challenge, as if the juror is "of the same society or corporation with the parties." It is sprincipall challenge, "Any interest in the action, direct or collateral, is ground of challenge, as if the juror is "of the same society or corporation with titler party."